93-359

Supreme Court, U.S.
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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

THE CITY OF DEL MAR,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a grantor, exercising his right to retain his fee title in an adjacent roadway, be held liable for violating the California Subdivision Map Act without violating his Due Process rights?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, James E. Smith, an individual, and the Respondent, the City of Del Mar, incorporated in April, 1961 as a California City with a present population of approximately 5,000 people.

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THE CITY OF DEL MAR,

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Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One State Of California

PETITION FOR WRIT OF CERTIORARI

The Petitioner James E. Smith respectfully prays that a writ of certiorari issue to review the April 27, 1993, opinion, modified on May 17, 1993, of the Court of Appeal, Fourth Appellate District, Division One, State of California, in the above-captioned proceeding; **or** summarily reverse the opinion with appropriate instructions.

OPINIONS BELOW

The California Supreme Court on June 9, 1993 denied the Petition for Review which was not reported and is reprinted in the Appendix hereto at Appendix page B-1[1].

The Opinion of the Court of Appeal, Fourth Appellate District, Division One, dated April 27, 1993, was not reported, and is reprinted at App. C-17-37; and was modified by order on May 17, 1993 (App. at C-38-39), after the May 5, 1993 Petition for Rehearing (App. at I-1-24); and the May 17, 1993 Modified Opinion was not reported, and is reprinted at App. C-40-60.

The judgment after court hearing of the Superior Court of San Diego County, dated July 9, 1991, was not reported, and is reprinted at App. K-1-2.

STATEMENT OF JURISDICTION

Petitioner seeks review of the May 17, 1993 Modified Opinion of the Court of Appeal, Fourth Appellate District, Division One. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment at § 1 of the United States Constitution provides in pertinent part; "No state

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[1] Hereinafter "App. at A . . . R and p #".

shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . . "

The substance of the rule of construction almost everywhere recognized, and which in a minority of cases is characterized as a rule of presumption, is that if land abutting on a roadway is conveyed by a description effective to cover it, the grantee, as part and parcel of the grant, takes title to the center line of the roadway if the grantor owns so much, unless an intention to the contrary sufficiently appears.

In California this doctrine is codified as a rebuttable presumption at California Civil Code §§ 831 and 1112 which were enacted in 1872. These §§ provide as follows:

§ 831. *BOUNDARIES BY WAYS*

"An owner of land bounded by a road or street is presumed to own to the center of the way, *but the contrary may be shown.*" Italics supplied.

§ 1112. TRANSFER OF LAND BOUNDED BY HIGHWAY

"A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, *unless a different intent appears from the grant.*" Italics supplied.

The principle of construction embodied within these two rebuttable presumption statutes was applied against Petitioner by application of the presumptions to the act of subdividing property as opposed to conveying property.

Respondent City concluded that Petitioner's expression of a *"contrary intent,"* as allowed by the statutes, in the deeds to the grantees constituted an illegal subdivision of property pursuant to the California Subdivision Map Act at Govt. Code § 66410 et seq.

Respondent City reasoned that the presumptions operated in 1925 when the subject streets/alleys were vacated by the County of San Diego (App. at M-3); and pursuant to the presumptions, the lots depicted on the recorded Final Maps included the adjacent streets/alleys upon vacation in 1925 (App. at N-1-4 and 0-1).

Petitioner's expression in the deeds that the roadways next to the lots being conveyed not pass with the conveyance of the lot(s) was then viewed as splitting this theoretical larger lot. This was, according to the City, a violation of the California Subdivision Map Act.

The trial court agreed with Respondent's theory. However, the Appeals Court's theory was that Petitioner failed to rebut the presumptions because "he did not show a contrary intent on the part of the original subdivider" and therefore illegally subdivided the lots (App. at C-56).

The following arguments will show that a recorded Final Subdivision Map "lot" is just what it says; that is, a lot depicted on the map. The lots referred to in the presumption cases exist by way of deed construction utilizing the presumptions of ownership to the center of the adjacent roadway.

The application of those presumptions to a Map Act case violates due process in that there is no "rational

connection" between the two; and puts the grantor of the property, whom the presumption works against, in an impossible situation as far as rebutting the presumption is concerned. One cannot show what the intent of an original subdivider was with regard to the principle of construction regarding ownership to the centerline. The map speaks for itself as far as Map Act issues are concerned. The presumptions are used to interpret conveyances of those lots depicted on the map. The two types of "lots" are entirely different. If commingled, as was done here, Due Process is violated.

REQUEST FOR JUDICIAL NOTICE

Petitioner hereby requests this Court to take "Judicial Notice" of the Petition for Writ of Certiorari, Case No. 93-163, filed in this Court on August 2, 1993 involving the same parties and court below. This Petition and other pending litigation was brought to this Court's attention at pp 5-7 of Case No. 93-163.

STATEMENT OF THE CASE

This case involves (4) lots (i.e., H, I, J and U), in the City of Del Mar, California which among other land was subdivided by final Map Nos. 1285 and 1343 in 1910 and 1911 (App. at P-1-2). The (4) lots range in size from 16,997 square feet to 35,380 square feet. (See Case No. 93-163, App. O at 1-2).

On December 9, 1977 Petitioner James E. Smith purchased the (20) Snakewall lots and adjacent streets/alleys which had been vacated in 1925 (App. at Q 1-3), in the City of Del Mar, California.

In 1988-89 Petitioner sold the (4) lots. In the deed(s) and conveyance documents Petitioner expressly excluded from the conveyance the adjacent vacated roadways. This must be done in order to prevent the operation of the presumption that the grantee will take title in the street area up to the centerline.

Respondent concluded that Petitioner's expression of a "contrary intent" in the conveyance documents constituted a violation of the California Subdivision Map Act.

Respondent filed "Notices of Violation of Illegal Subdivision" On October 30, 1990 and January 14, 1991 (App. at N-1-4 and O-1); and the purchasers subsequently filed actions against Petitioner for rescission.

Petitioner's first knowledge of the October 30, 1990 recordation by Respondent of the "Notices of Violation Illegal Subdivision" (App. at N-1-4), was on November 27, 1990 when he was served the Roulette, et al Complaint in S033948/D017058/N49451 (App. at I-11).

Petitioner on January 28, 1991 filed a Petition for Writ of Mandate in the California Superior Court of San Diego County (App. at L-1-12). This action was based on the "Violation Notices" being violative of California statutory and case law, no California precedent, politically motivated, abuse of discretion, not supported by evidence presented, arbitrary and capricious and estoppel (App. at L-7-10). The San Diego Superior Court, Judge Prager

presiding, found in favor of Respondent City of Del Mar (App. at K-1-2). Petitioner appealed and the Fourth District Court of Appeals affirmed Judge Prager's judgment (App. at C-40-60).

On June 9, 1993 the California Supreme Court denied Petitioner's Petition for Review (App. at A-1-2, B-1 and C-1-77, D-1-9, E-1-18, F-1-9, G-1-25 and H-1-5).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the applicable decisions of the United States Supreme Court. This ground for review is present in this case.

As this Court will see Respondent City has effectively once again prevented any development or sales of Petitioner's property. Once again private property rights are all but ignored by control minded governmental bodies. This case is unique however, in that the method used is itself unique; but no less violative of Due Process than if legislation had been enacted prohibiting Petitioner from selling his property.

I

PETITIONER WAS DENIED DUE PROCESS AS A RESULT OF RESPONDENT CITY AND THE COURTS BELOW UNCONSTITUTIONAL APPLICATION OF THE PRESUMPTION(S) AT CALIFORNIA CIVIL CODE § 831 AND § 1112 TO CALIFORNIA GOVT. CODE (SUBDIVISION MAP ACT) § 66410 ET SEQ

Preceding the inception of this litigation Respondent applied the presumptions at California Civil Code §§ 831 and 1112 as effective in 1925 when the streets/alleys were vacated (App. at M-3). Petitioner never had an opportunity to rebut the presumption at the administrative level primarily because administrative agencies, such as the Del Mar Planning Department, do not have the authority to apply presumptions to fact situations in a judicial manner.

The principle recognized almost everywhere, either as a general rule of construction or as a rebuttable presumption,[2] is that if land abutting on a roadway is conveyed by a description or designation apt or effective to cover it, and the grantor owns the fee to the center of the roadway, the grantee takes title to the centerline of the roadway as part and parcel of the grant, unless an intention to the contrary sufficiently appears.

In some jurisdictions, the general rule of construction or rebuttable presumption is expressed by statute as in

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[2] Whether the rule upon which the grantee relies is expressed as a presumption or not, the results are much the same. See *Boston Five Cent. Sav. Bank v. Massachusetts General Hospital* 255 Mass. 583 at 585 (1926); 152 N.E. 40; Annotation 49 ALR 2d 987 § 2.

California. California Civil Code sections 831 and 1112 codify the principle of the grantee taking title to the center of the road absent a contrary intent on the part of the grantor.

The analysis done by the City was best described by the attorney for the City of Del Mar at oral argument on the Appeal at the Appellate Court.

> "Mr. Potter: And it seems to me that the City felt an obligation to follow the language of the Map Act, and it attempted to analyze the lots, the alleys, and the presumptions in – the best it could." (See App. at J-18).

This indicates that the initial due process violation was accomplished by the City analyzing "presumptions" and making decisions based upon them. In California and most, if not all, jurisdictions, including Federal, "presumptions" and their handling and application are the exclusive province of courts of law in "actions." The definition of "presumption" in all jurisdictions is essentially the same. California Evidence Code § 600(a) states that a presumption is:

> " . . . an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the 'action.' "

California Evidence Code § 105 provides:

ACTION DEFINED

> "Action" includes a civil action and a criminal action.

An "action" is defined at California Code of Civil Procedure § 22 as:

> "An action is an ordinary proceeding in a Court of Justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

California law does not provide for City Planning Departments nor City Councils to be considered as Courts of Justice for purposes of the application of presumptions to particular fact situations. Therefore, it is submitted that the City exceeded its authority when it attempted to resolve the question of ownership of streets adjacent to lots utilizing the presumptions of California Civil Code §§ 831 and 1112. By exceeding their authority Respondent City violated Petitioner's Due Process rights.

> "It is for the trial court to determine whether a presumption or inference has been overcome by preponderating evidence." *Casella Estate* 256 Cal.App.2d 312 (1967).

The Court below summed up Respondent's position as follows:

> "The Court: Mr. Potter, so if I understand your case, all of this is built on an interpretation of the 1910, 1913 subdivision map, which shows a grid overlaying on this property of lots with streets and alleys delineated. And you're relying on the presumption that those lots include the fee to the center line of the streets and alleys with an easement.
>
> Mr. Potter: Yes.

The Court: And later – what, 1925? – those streets and alley are vacated –

Mr. Potter: Correct.

The Court: – and therefore, the fee, the easement goes away. The fee goes to the center lines. We don't have any streets and alleys now laid out in this. That will come later. And your position is that Mr. Smith, when he – purportedly excluding those formerly delineated streets and alleys, has divided those properties, not from the 1920, but from the original 1910 delineation, which included, by presumption, the fee to the center line, I think.

Mr. Potter: Yes. I think that's a fair statement." (See App. at J-15-16).

At the risk of head scratching befuddlement, the above dialogue held between the Appellate Court and the attorney for the City was printed to demonstrate the inappropriate interpretation and application of the presumptions to this alleged Subdivision Map Act case.

The Appellate Court echoes this dialogue in its written Opinion:

"Here, the Snakewall subdivision of 1910 to 1913 contained various streets and alleys which were dedicated to the County of San Diego. Under the Civil Code, it is presumed each lot in the Snakewall subdivision which was adjacent to a street or alley extended to the centerline of the street or alley subject to the public's easement to use the streets and alleys. Smith presented no evidence to show the original subdivider had any other intent. *Thus, at the time of the original subdivision, lots H, I, J and U*

> *included half of the adjacent alley."* (See App. at C-56). Italics supplied.

Essentially, this conclusion reached by the Court of Appeal is the crux of Petitioner's Due Process claim. The Court of Appeal not only incorrectly interpreted the functioning and effect of the principle holding that the grantee takes title to the center of the street absent a contrary intent on the part of the grantor, but the Court also put an inexorable burden upon Petitioner. The Court below should have been interpreting the conveyance, not the map. The burden on Petitioner is due to the fact that by attempting to interpret the subdivision map by utilizing the presumptions of §§ 831 and 1112, Petitioner, nor any grantor, could ever rebut the presumption.

The act of subdividing the property and filing the final map thereof has nothing to do with the application of the principle of ownership to the center line of the adjoining street absent a contrary intent by the grantor. The Court of Appeal is misguided when it applies the principle to questions involving illegal subdivisions of lots which is proscribed by the Subdivision Map Act.

In a case dealing specifically with the presumption statutes at §§ 831 and 1112 the Federal Court for the Ninth Circuit has stated:

> "It is clear to the Court that the provisions of Civil Code §§ 1112 and 831, can *only apply* in the case of a *grant* . . . " (Italics supplied by Court). "The Court is of the opinion . . . that the presumptions of the California Codes [§§ 1112, 831] supra, which *apply only in a conveyance* resulting from a grant . . . " *United States v. 5.324 Acres of*

Land 79 F.Supp. 748 at 761 (1948). Italics supplied.

In California the rule regarding application of the presumptions is as follows:

> "This code section [1112] establishes a rule of construction sometimes referred to as a presumption, with respect to the effect of a deed conveying property described as bounded by a street. *Application of the rule is limited to a deed containing a description wherein the street as such is used as a boundary.*" Italics supplied. *Speer v. Blasker* 915 Cal.App.2d 155 at 158 (1961); And with regard to section 831 the *Speer* Court writes:
>
> " . . . under the provisions of section 831 . . . *the intention of the parties to the deed is the determinative factor.*" *Id.*, at 162. Citations omitted.

All of the cases agree that the rule of construction or of so-called presumption, which ordinarily carries title to the roadway's centerline, is not conclusive, but yields wherever an intention to the contrary sufficiently appears. The rule it has been said, "must be applied in the light of the intention of the parties." *Harris v. Carter* 189 NC 295 at 297; 127 S.E. 1 at 2 (1925). The rule applies when the case is to be decided upon presumption, that is, "in those cases in which the intention of the grantor rests upon presumption." *Joens v. Baumbach* 193 Cal. 567 at 571 (1924). (See generally 49 ALR 2d 994, § 4.)

> "A plan referred to in a deed becomes a part of the contract so far as may be necessary to aid in the identification of the lots and to determine the rights intended to be conveyed. But the presumption is not conclusive. The rule by which

> the mention of a way as a boundary in a conveyance of land is presumed to mean the middle of the way, if the way belongs to the grantor, is not an absolute rule of law, irrespective of manifest intention, like the rule in Shelley's case, but is merely a principle of interpretation adopted for the purpose of finding out the true meaning of the words used. [Citations]. After reviewing the cases concerning this rule of presumed intent, the court said, in part, the underlying principle on which they all rest is that the intent of the parties in each instance was ascertained from the words used in the written instrument interpreted in light of all the attendant facts. That is the general principle governing the interpretation of deeds." *Suburban Land Co. v. Town of Billerica* 49 N.E.2d 1012 at 1015 (1943) (S.C. Mass.). Citations omitted.

Federal decisions have also upheld the rule that the presumption only applies to an interpretation of the deed between the parties and the ascertainment of the intention of the parties, particularly that of the grantor.

> " . . . the terms and circumstances of the grant, . . . unless an intention to retain title to the street clearly appears from the conditions of the conveyance." *Faulks v. Schrider* 99 Fed.2d 370 at 372 (1938); "presumptions apply and can only apply in the case of a grant . . . ". *United States v. 5.324 Acres of Land* 79 F.Supp. 748 at 761 (1948); " . . . such title to city lots would not include the land under the adjoining streets." *Federal Crude Oil Co. v. Yount-Lee Oil Co.* 103 F.2d 171, at 174 (1939); "Where land is granted bounding upon a way, public or private, the question whether it extends to the sideline or to the center line of the way, is a question of construction in each

> particular case, and depends upon the intent of the parties as expressed in the descriptive part of the deed, explained and illustrated by all the other parts . . . " *Banks v. Ogden* 69 U.S. 57 at 68 (Dec. 1864); Vol. 17 L.Ed. 818.

From the foregoing authorities, and from the rule of law as it exists in this country today, the presumption of ownership to the center of the adjoining way is applied only in the fact situation involving the construction of a deed of conveyance.

In the case at bar, those presumptions [§§ 831 and 1112] were not applied to Petitioner's deed to his grantees nor to any other conveyance. Had they been so applied they would have immediately been dispelled by the language of the deed(s). (See App. at R-2). Furthermore, the Appeal Court openly acknowledges the "contrary intent" language:

> "In 1988, Smith sold Lots H, I and J by the lot number on the 1910 subdivision map, but specifically excluded that portion of the alley adjoining said [lot H, I or J] as closed to public use." (See App. at C-42).

Petitioner did exactly and precisely what a grantor must do to prevent the presumptions from becoming operative and thereby allowing the fee in his roadway adjacent to the lot(s) up to the center line to pass with the conveyance.

Yet it is this act which has provided the basis for the City and the Courts below to declare that the act of expressing a contrary intent is unlawful in that it violates the Subdivision Map Act of California.

> "The general rule is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such a way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. *But it is not unlawful to retain such a strip.* If the intention to do so is clear, the contrary presumption must yield." *Cities Service Oil Co. v. Dunlap* 100 Fed.2d 294 at 297 (1938). Italics supplied.

It cannot be unlawful to do what the law says you must do in order to avoid having your land pass to another by virtue of the presumption. This is completely out of harmony with our Constitutional system and Due Process.

The Due Process violation occurs as a result of the application of the principle (presumption) to a fact situation which is not "rationally related" to the presumption. The presumptions and the Map Act are not "rationally related."

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Mobile, Jackson & Kansas City Railroad Company v. Turnipseed, Administrator* 219 U.S. 35 at 43 (1910).

There is no rational relation between the presumptions of §§ 831 and 1112 and the Subdivision Map Act of

California. To apply those presumptions to a Map Act case similarly lacks a "rational connection" and is therefore violative of Due Process.

In *Iran v. Immigration and Naturalization Service* 656 F.2d 469 at 471 (1981) the Federal Court of Appeals for the Ninth Circuit considered the question of illegal entry and the establishment prima facie of alienage and the applicability of the presumption raised by 8 U.S.C. § 1361. The Court stated:

> "The subject of the immigration proceeding then has the burden of proving the time, place and manner of his entry into the United States, and, if this burden is not met, the subject is presumed to be in the United States in violation of law and, therefore, deportable. Since petitioner failed to submit any evidence at the hearing, if this were a case involving illegal entry he would be presumed to be in the United States in violation of the law, and the *INS* would have met its burden of proving deportability by clear, unequivocal, and convincing evidence. The presumption raised by section 1361 does not operate, however, in cases like petitioner's, in which the charge is that the alien remained beyond the time authorized, or, more generally, in cases not involving illegal entry." *Id* at page 471.

The Court gave a short lesson to the Government on how presumptions work. In the case at bar, both the City and the Courts below apparently need that lesson. In cases filed to determine ownership of the fee in abutting roadways up to the center line, the grantee, i.e., owner of the property adjacent to the roadway, establishes a prima

facie case by producing a deed showing proof of ownership (§ 831), and/or showing that the deed describes the property conveyed as being bounded by a road (§ 1112).

> "The owner of the village lot is prima facie the owner to the middle of the street." *Banks v. Ogden* 69 U.S. 57 (Dec. 1864); Vol. 17 L.Ed. 818 at 820, citing additional authorities.

The grantor of the property adjacent to the street, whom must also own the street, then has the burden of proving that his intent was for the grantee not to take, by way of the presumption, the fee in his roadway portion when the lot adjacent thereto was conveyed. The most substantial way in which the grantor can do this is by specifically expressing that intention in the deed itself. *Safwenberg v. Marquez* 50 C.A.3d, 301 (1975); *Machado v. Title Guarantee and Trust Co.* 15 Cal.2d 180 (1940); *Speer v. Blasker* 195 Cal.App.2d 155 (1961); *Faulks v. Schrider* 99 F.2d 370 at 372 (1938); *Banks v. Ogden* 69 U.S. 57 at 68 (Dec. 1864), Vol. 17 L.Ed. 818 at 820.

The court below states:

> "Smith sold lots H, I, and J . . . but specifically excluded that portion of the alley adjoining said [lot H, I or J] . . . " (App. at C-42).

The Court, however, felt that this excluding language, had the effect of dividing a "lot," thereby violating the Subdivision Map Act.

This theory is founded upon the notion, as alluded to earlier, that the principle of ownership to the center of the adjoining roadway worked at the time of subdivision to make the center line the technical boundary. Therefore, when the excluding language was included within the

deed(s) the street portion was severed and therefore a division of a perceived larger lot occurred, i.e., one extending beyond the boundaries of the lot(s), as those boundaries are depicted on the recorded Final Map, up to the center line.

The heart of the problem at hand is actually easily recognizable.

The City and the Courts below have supplanted a *technical* "lot," which is described as having a boundary at the center line of the adjacent street, into the context of a Subdivision Map Act analysis.

This is the first time in the State of California and this Country that this disingenuous approach has been taken with regard to this issue.

The Court of Appeal held:

> "Under the Civil Code, it is presumed each lot in the Snakewall Subdivision which was adjacent to a street or alley extended to the centerline of the street or alley subject to the public's easement to use the streets and alleys. Smith presented no evidence to show the original subdivider had any other intent. Thus, at the time of the original subdivision, lots H, I, J and U included half of the adjacent alley." (App. at C-56).

It is fundamentally unfair as well as legally improper for the Court below to find that Petitioner had to show a "contrary intent" in 1910 and 1911 when the original subdivisions were recorded. The Court never makes mention of prior conveyances at all even though they too would have been irrelevant to a question of ownership of the adjacent vacated streets/alleys because any questions

of ownership only goes back in the chain of title to the point of the common grantor. However, by mentioning the prior conveyance the Court would have at least been going in the right direction.

If the grantees had questioned ownership of the adjacent streets/alleys then they would be relying upon their deeds to trace title.

> "When Plaintiff relies on a paper title alone, he must trace his title (a) to the government, (b) to a grantor in possession at the time of conveyance to Plaintiff, or (c) to a source common to the chains of title of Plaintiff and Defendant." *Ogden's Revised California Real Property Law*, Vol. II, § 27:52, p. 1352, by Arthur G. Bowman, Cont. Ed. of the Bar (1975) citing *Helvey v. Sax* (1951) 38 Cal.2d 21.

Petitioner was their common grantor, therefore, his conveyance to them was as far back as they could look. Aside from the mechanical defects which are glaringly apparent in the rationale proffered by the City, the simple fact remains that neither Petitioner, nor anyone else, could look at a subdivision map and conclude anything other than that the original subdivider intended that the land depicted on the map be acted upon just as it is depicted. In other words, the map speaks for itself. Petitioner submits that the map does speak for itself and that pursuant to the Subdivision Map Act of California, if a "lot" depicted on that map is transferred to the grantee per the Map, then it is legally impossible to divide that lot by that conveyance.

A "lot" for purposes of a Subdivision Map Act analysis can only be the "lot(s)" depicted on the Final Subdivision Map.

The principle of law regarding ownership to the centerline is applicable *only* to conveyances, no other fact situation.

The City and the Court below treated the presumption more as an independent source of substantive law than as a presumption. A similar situation was found in *Iran v. INS*, supra, 656 F.2d 469 (1981). The Court, commenting upon the Government's application of a presumption to the wrong type of case said:

> "First, there would be no legitimate reason to require proof on the issue of illegal entry in cases not involving that issue. Second, it is apparent that section 1361 was not intended to be an independent source of substantive law. Rather it was intended to create a procedural rule modifying the allocation of proof on the issue of illegal entry. If section 1361 were applied in all deportation cases, it would provide a substantive basis for deportability in cases which do not otherwise involve the question of illegal entry. Third, the application of section 1361 in cases in which illegal entry is not an element of the charge of deportability would raise a serious constitutional question. In this circuit, [D]eportation on a charge not presented in the order to show cause, or at the hearing . . . offends due process. [Citations] *Id* at 471.

Section 66499.31 of the California Govt. Code (Map Act) provides that persons guilty of violating the provisions of the Act "shall be punishable by imprisonment in the county jail or in state prison . . . ". No one would

dispute that had a criminal complaint been filed it would have been defective for the reasons given in *Iran v. INS*, supra. So too should it be with a civil complaint or as in the present case, a declaration of violation by the City.

The presumptions of § 831 and § 1112 are rebuttable and as such were intended to create a procedural rule modifying the allocation of proof on the issue of ownership of the adjacent alley or street portions.

Applying the presumptions in other than that way offends due process.

II

PURSUANT TO THE SUBDIVISION MAP ACT OF CALIFORNIA THE CONVEYANCE OF A LOT AS THE LOT IS DEPICTED ON A FINAL MAP CANNOT BY LAW CONSTITUTE AN ILLEGAL SUBDIVISION OF PROPERTY

The Subdivision Map Act provides that a conveyance of a lot "shall be lawful and sufficient" when described by reference to the map. California Govt. Code (Map Act) § 66499.57 provides:

> "Whenever the City Council or Board of Supervisors adopts a map prepared under this division as the official map of the subdivision, town, city or county, *it shall be lawful and sufficient to describe the lots* or blocks in any deeds, conveyances, contracts, or obligations affecting any of the lots or blocks as designated on the official map, *a reference sufficient for the identification of the map* being coupled with the description." Italics supplied.

The Map Act provides that a "lot" is as follows:

> "Whenever any city, town or subdivision of land is platted or divided into *lots* or blocks, and whenever any addition to any city, town or subdivision is laid out into *lots* or blocks for the purpose of sale or transfer, the city engineer or the county surveyor, under the direction and with the approval of the City Council or Board of Supervisors, may make an official map of the city, town or subdivision, giving to each block on the map a number, *and to each lot* or subdivision in the block on the map *a separate* number or *letter*, and giving names to the streets, lanes, avenues, courts, commons or parks, *as may be delineated on the official map*." California Govt. Code (Map Act) § 66499.52. Italics supplied.

'*Delineate*': To draw in outline; trace out. To represent by a drawing; depict. *Standard College Dictionary* (1971) Funk & Wagnalls, p 353.

From the above referenced Code section and from basic common sense it is not difficult to envision a typical subdivision map depicting streets and alleys winding through variously sized lots identified typically by letter. So it was in the case at bar. Lots H, I, J and U were delineated and depicted as being bounded by streets/alleys.

The grant deeds to the purchasers from Petitioner specifically conveyed the subject lots by describing them as they were depicted on Final Map Nos. 1285 or 1343. It was the roadway adjacent to the lot which was excluded or prevented from passing. The "lot" as depicted was conveyed.

The Map Act even provides an exemption from civil action for violation of the Act if the grantor describes the property conveyed by reference to the final map on which the lot is depicted. At California Govt. Code (Map Act) § 66499.32(a) remedies such as rescission are afforded purchasers of property which has been illegally subdivided. However, at § 66499.32 next to the last paragraph, the following is stated:

> "The provisions of this section shall not apply to the conveyance of any parcel of real property . . . identified in a recorded final map . . . ".

This exempting provision is brought to the Court's attention to further illustrate the significance and importance of final maps. Needless to say, if anyone having any dealings whatsoever with a conveyance of property cannot rely on the maps, which depict the property, to reflect a true representation of the boundaries and dimensions of the property then land transfers in this country would be in total chaos.

Regarding the 1910 and 1911 subdivision of the property, the Court below clearly recognized that the subdivision maps depicting lots H, I, J and U were the same as the assessor's roll "showing the same streets and alleys as contained in the original subdivision maps . . . ". (App. at C-52, Fn[6]). The Map Act defines "subdivision" as follows:

> "The division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing . . . " (Govt. Code § 66424).

Observing the recognition by the Court below that the assessor's roll and the subdivision map correspond to one another, one must admit to befuddlement when confronted with a scenario whereby a lot is conveyed and described as it appears on the Final Maps as well as the assessor's roll and then be told that the conveyance resulted in a "subdivision" of that lot.

So it is in the case at bar. Lots H, I and J, Map No. 1285 and lot U, Map No. 1343 were conveyed as depicted on the Maps. The conveyance documents for lots H, I, J and U use similar language as that set forth for lot H, Map No. 1285, Parcel 1, at App. R-1-2.

III

THE EFFECT OF THE EXCLUDING LANGUAGE IN THE DEED(S) HAS NOTHING TO DO WITH WHETHER OR NOT A LOT WAS ILLEGALLY SUBDIVIDED

When Petitioner sold the lots he expressed his intention in the sales documents and deed(s) that the alleys and streets adjacent to the lots not pass with the conveyance. This Honorable Court, more than one hundred years ago, discussed the nature of the expression of "contrary intent" when dealing with the principle of the grantor also conveying his fee in the street with the conveyance of an adjacent lot.

> "As between grantor and grantee, the conveyance of a lot bounded upon a street in a city carries the land to the center of the street.
>
> The idea of an intention in the grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the

adjoining land is never presumed. It would be contrary to universal practice, and *would require an express declaration* or something equivalent thereto, to sustain such an inference." *Banks v. Ogden* 69 U.S. 57 (Dec. 1864); Vol. 17 L.Ed. 818 at 819, citing additional authorities. Italics supplied.

In California the law is the same.

"Here the deed, on its face, conveyed one-half of the adjacent street to Marquez and one-half to Sanchez as a matter of law. *If the owner of the land had intended a different result an indication should have been made in the deed itself.*" *Safwenberg v. Marquez* 50 C.A.3d 301 at 309 (1975). Italics supplied.

IV

THE PRESUMPTION OF OWNERSHIP TO THE CENTER OF ADJOINING STREETS OR ALLEYS IS NOT APPLICABLE TO ACTIONS NOT INVOLVING THE CONSTRUCTION OF THE GRANT

California Civil Code §§ 831 and 1112 are rebuttable presumption statutes and provide as follows:

"A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, *unless a different intent appears from the grant.*" Enacted 1872, Calif. Civil Code § 1112. Italics supplied.

"An owner of land bounded by a road or street is presumed to own to the center of the way; *but the contrary may be shown.*" Enacted 1872, Calif. Civil Code § 831. Italics supplied.

[See *City of Redlands v. Nickerson* 188 Cal.App.2d 118 at 125 (1961); and *Pinsky v. Sloat* 130 Cal.App.2d 579 (1955).]

> "A presumption [is] a rule of law, created by statute, or judicial decision, in which a finding of the basic fact of the presumption gives rise to the existence of the presumed fact until the presumption is rebutted and becomes inoperative." L. Whinery, *Manual of Evidence*, Ch. 4, Part A, § 1. Also see *Cases and Materials on Evidence*, 698 (5th Ed. 1965), Maguire, Weinstein, Chadbourn and Mansfield.

The California Evidence Code § 600 (a) defines "presumption" as follows:

> "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action."

And, with regard to rebuttable presumptions, California Evidence Code § 601 classifies them as either; (a) presumption affecting the burden of producing evidence; or (b) a presumption affecting the burden of proof.

Whether the presumptions of §§ 831 and 1112 affect the burden of producing evidence or affects the burden of proof is not specified in the statutes themselves. This debate however is of no real consequence here. Of consequence, however, is the fact that in either case the burden of either proof or producing evidence is laid upon the grantor in cases involving §§ 831 and 1112 such that he may attempt a rebuttal.

In the case at bar, the Planning Department not only should not have been acting as a court of law and applying presumptions to fact situations, but the method by

which they attempted to apply the presumptions was incorrect also. Petitioner could not have rebutted the presumptions in any way because the presumptions are not applicable to a California Subdivision Map Act analysis. They only apply to the interpretation of conveyance grants or deeds.

V

EFFECT OF THE LOWER COURT RULING

At first blush this case may appear to be that of just another disgruntled citizen winding his way in pro per through the legal corridors of the judicial system and now finding himself at the last, as of yet, unopened door.

However, the holding of the court below goes much beyond these pleadings. All of the people in California who own lawfully subdivided land adjacent to a roadway cannot sell the land adjacent to that roadway and retain their fee title in the roadway without being in violation of the California Subdivision Map Act.

This holding means that one cannot rely on the integrity of maps of land approved by the government, because even though not depicted as extending to the center line of the adjacent roadway, the lot lines really should be viewed as extending that far absent a *subdivider's* intent to the contrary. This is an untenable situation which Due Process will not allow.

One has to be able to rely on the maps which delineate the land that one is conveyed. If, pursuant to the principle, a grantee also takes the fee in the adjacent roadway area in addition to the grant of the "lot," then

that is something quite apart and separate from a determination that one has by reference to a recorded Final Map, violated the provisions of a Map Act.

Within the Federal System itself there is the Interstate Land Sales Full Disclosure Act (15 U.S.C. §§ 1701 et seq). § 1703 of the Act begins by stating that it will be unlawful for any developer or agent to use any means of interstate commerce;

> "(1) with respect to the sale or lease of any lot not exempt under § 1403 [15 U.S.C. § 1702] . . . " (Also see § 1705 generally regarding information required in statement of record.)

How would anyone ever know if they were transferring a "lot"? Based upon the holding of the Court below any grantor, by expressing a "contrary intent" concerning his fee owned roadway would be in violation of the California Map Act and therefore could not rely upon the recorded Final Map which depicts and delineates the lot(s) conveyed. Although seemingly far fetched, so was the case at bar at its inception.

Case No. 93-163 pending in this Court involves the issue of a governmental taking of private property as the result of a regulation that went too far by preventing not only development but also the sale of the same lot(s) as those herein by the destruction of their lot lines as well as "spot zoning."

Petitioner has not pled this case as a "taking" case, although with hindsight that issue is clearly present. The due process violations from both a procedural and substantive standpoint are evident. It is within that evidence

wherein lies the next nail for the coffin of Petitioner's or, for that matter, anyone's private property rights.

The City, through a disingenuous method has managed to once again prohibit Petitioner's lot(s) from becoming anything other than open space and they have done it without the need to enact questionable legislation.

They have done it through an egregious violation of Petitioner's due process rights under the Fifth and Fourteenth Amendments to the Constitution.

It is this violation which when considered in the framework of this case, presents not only a federal question, but a substantial federal question and one which should be reviewed by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted. Alternatively, the issues of law presented herein, when viewed in the light of the holding of the Court below may well convince the Court to summarily reverse the Court below and remand the case with appropriate instructions.

Dated: September 1, 1993

Respectfully submitted,

/s/ James E. Smith
James E. Smith
Propria Persona

APPENDIX

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APPENDIX A

(Seal)

SUPREME COURT OF CALIFORNIA

SAN FRANCISCO, CALIFORNIA

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

JOHN C. ROSSI
Assistant Clerk-Administrator

San Francisco

ROBERT F. JOHNSON
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Los Angeles

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Calendar Coordinator

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Ronald Reagan Building
300 South Spring Street
Los Angeles, California 90013

[_] SACRAMENTO 95814
100 Library and Courts Building
(916) 322-5957

16 June 1993

James E. Smith
2100 Gatun Street
Del Mar, Ca. 92014

RE: S033083 – Smith v. City of Del Mar

Dear Mr. Smith,

Returned unfiled is your "Addendum to Reply, etc." received today in the above-referenced case. The order of

this Court filed June 9, 1993, denying your petition for review and application for stay was final forthwith and may not be vacated and reconsidered. Please understand that it is the policy of the Court that when a petitioner requests a stay, the decision on the petition is accelerated and the Court is not bound by time limits set forth in Rule 28 of the California Rules of Court.

Very truly yours,

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME
COURT

/s/ John C. Rossi
John C. Rossi
Assistant Clerk-Administrator

Encl.

APPENDIX B

No. 4/1 D015814 – S033083

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

(Filed June 9, 1993)

JAMES E. SMITH, Appellant

v.

CITY OF DEL MAR et al., Respondents

Application for stay and petition for review DENIED.

/s/ Lucas
Chief Justice

APPENDIX C

CIVIL NO. S033083

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith, Petitioner and Appellant, vs. The City of Del Mar, Respondent.	CIVIL NO. S033083 (4th DCA, Div. One D015814) (No.Co.Sup.Ct. N50142)

PETITION FOR REVIEW AND "STAY"

An Appeal From the Judgment of the
Superior Court of the
State of California, San Diego County
Honorable Ronald S. Pager, Judge

James E. Smith
2100 Gatun Street
Del Mar, California 92014
Phone 619-755-7794
Propria Persona for Appellant

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COURT: THE SUPREME COURT, STATE OF CALIFORNIA;
CASE NAME: JAMES E. SMITH, PETITIONER VS. THE CITY OF DEL MAR, RESPONDENT;
CASE NO. S___; Fourth DCA, Div. One D015814; NCSC N50142.

PROOF OF FILING (PRIORITY MAIL) AND SERVICE BY MAIL

I, Norma J. Hewitt, declare that I am over the age of eighteen years and not a party to this action; my business address is 5665 Obelin Drive, Suite 100, San Diego, California 92121; that I served the below named the following documents in the following manner: PETITION FOR REVIEW AND "STAY" AND PROOF OF FILING AND SERVICE,

By placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then

sealed each envelope, and deposited each in the United States mail at Solana Beach, California 92075 on May 27, 1993.

California Supreme Court
South Tower – Eighth Floor
303 Second Street
San Francisco, Calif. 94107
(Original and 13 copies)

Hon. T. R. Murphy
North County Superior Court
Dept. M
325 So. Melrose Dr.
Vista, CA 92083
(1 copy; Re: 6/1/93 N49451/
D017058 Motion to Sell Lots,
etc., Telephonic Ruling

Mark A. Potter, Esq.
Attorney at Law
5090 Shoreham Pl., Suite 101
San Diego, CA 92122-5934
For Respondent City (1 copy)

Jack A. Curtis, Esq.
Gary A. Powell, Esq.
Attorneys at Law
750 N. Jefferson
Springfield, Missouri 65802
(1 copy; Re: Thelma L. Smith
Estate CV292-252, Attachment
by Plaintiff N49451/D017058)

Clerk of the Fourth DCA
Court of Appeal Division-One
Fourth Appellant District
750 "B" St., Suite 500
San Diego, CA 92101
(1 copy)

Circuit Court of the State of
Missouri
Greene County Probate Division
Greene Co. Courthouse
Suite 22
Don Burrell, Circuit Jduge
Division 5
Springfield, Missouri 65802
(1 copy Re: 6/8/93
Attachment Hearing, Thelma L.
Smith Estate CV292-252 by
Plaintiffs N49451/D017058)

Gerald L. Gorman, Esq.
Gorman and Noorigian
Attorneys at Law
450 B Street, Suite 860
San Diego, CA 92101-8003
For Plaintiffs/Respondents
Roulette, et al; Case No.
D017058/N49451; (Re: 6/1/93
"Telephonic Ruling", No. Co.
Sup. Ct., Dept D, 1 copy)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 27, 1993 at San Diego, California.

/s/ Norma J. Hewitt
Norma J. Hewitt

CIVIL NO. S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith, **Petitioner and Appellant,** **vs.** **The City of Del Mar,** **Defendant and Respondent.**	**CIVIL NO. S_____** 4th DCA, Div. One D015814 and N50142 No. C. Sup. Ct.

PETITION FOR REVIEW

On Appeal From the Judgment of the
Superior Court of the
State of California, San Diego County
Honorable Ronald L. Prager, Judge

To the Honorable Malcolm Lucas, Chief Justice and to the Honorable Associate Justices of the Supreme Court of California:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

When selling legally subdivided lot(s), does the expression of a "contrary intent" in the conveyance sales documents reserving ownership of seller fee owned vacated streets/alleys as provided for at C.C. §§ 831 and 1112 create illegally subdivided lot(s) pursuant to Govt. Code § 66424? See C.C. § 23.3. This Petition presents for review the issue of the applicability of Street and Highway Code § 8351 and Civil Code §§ 831 and 1112 to the provisions of Government Code (Subdivision Map Act, hereinafter Map Act) §§ 66410-66499.58; SPECIFICALLY,

Govt. Code §§ 66424; as well as 66412.6, 66412.7, 66413, 66499.30(d), 66499.32 (next to last ¶), 66499.35(c)(d)(e), 66499.36, 66499.37, 66499.52(b) and 66499.57.

James E. Smith, Petitioner, hereby petitions for review of the Opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, filed in this action on April 27, 1993, affirming the judgment of the trial court in favor of Respondent. A copy of the Opinion of the Court of Appeal showing the date of its filing, i.e. 4/27/93, is set forth herein as Appendix "C" OP, pp. 1-22.

The 4th DCA Court of Appeal, April 27, 1993 Opinion, supra, was modified by Order dated May 17, 1993 after Petitioner filed on May 5, 1993 his "Petition for Rehearing". A copy of the "Order Modifying Opinion" showing the date of its filing, i.e. 5/17/93, is set forth herein as Appendix "B", OMOP, pp. 1-2.

The 4th DCA Court of Appeal, April 27, 1993 "Opinion" supra, as Modified, supra, on May 17, 1993 is set forth herein as Appendix "C" MOP, pp. 1-21.

Review by this Court is necessary on the ground that the decisions of the lower court and the Court of Appeal are 'first impression, i.e. legislative; and not in line with the authorities cited; and this Court's ruling is necessary to secure uniformity of decision; and settlement of important questions of law; and void this 'legislative' opinion.

BRIEF IN SUPPORT OF PETITION FOR REVIEW AND "STAY"

POINT I

THE LOWER COURT INCORRECTLY INTERPRETED AND INCORRECTLY APPLIED THE PRESUMPTIONS OF CIVIL CODE §§ 831 AND 1112 TO THE FACTS

At page 16 of MOP, Appendix "C", the Court of Appeal opines:

> "Here, the Snakewall subdivision of 1910 to 1913 contained various streets and alleys which were dedicated to the County of San Diego. Under the Civil code, it is presumed each lot in the Snakewall subdivision which was adjacent to a street or alley extended to the center line of the street or alley subject to the public's easement to use the streets and alleys. Smith presented no evidence to show the original subdivider had any other intent. Thus, *at the time of the original subdivision, lots H, I, J and U included half of the adjacent alley.* (Emphasis added.)

The obvious inference to be drawn from the above portion of the opinion is that the Court believes that the presumptions of C.C. §§ 831 and 1112 operated in 1910-1913 to unite the lots with the adjacent streets and alleys. This is clearly incorrect.

The presumptions of C.C. §§ 831 and 1112 cannot be used to effectuate ownership of the streets/alleys in the owner(s) of the adjacent lots. *Arthur G. Bowan, Ogden's Revised California Real Property Law,* Vol. I, Cont. Ed. of the Bar (1975), § 15.18, p. 648. These presumptions are rules of construction applied in an action to determine which

party has the burden of producing evidence. Appellant's Reply Brief p. 16, LL 16-22; and said Reply Brief arguments II D, E and F, pp. 13-24, set forth further authority and amplification concerning 'presumptions'.

C.C. §§ 831 and 1112 are presumptions which apply to the factual situation involving a dispute over ownership of one-half of the street/alley portion which is adjacent to a lot or parcel of land. Under California law, a person owning land adjacent to a road is presumed to own the land to the center of the road *unless the contrary is shown*. See C.C. § 831. Also, C.C. § 1112 provides that when a person transfers land adjacent to a road, it is presumed he transfers title to the center of the road *unless the grant shows a different intent.*

It is, or should be, axiomatic that presumptions of any type, are merely rules of construction applied in an action to determine which party has the burden of producing evidence.

Section 600(a) of the Evidence Code provides:

> "(a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence."

Therefore, in order to apply a presumption to a set of facts we must first and foremost have an 'action'. Without the 'action' a presumption is essentially meaningless. The presumptions of C.C. §§ 831 and 1112 deal with fee title ownership of the land and one-half the street which is adjacent to the lot sold.

Regarding section 1112 of the Civil Code the following establishes the method by which that section operates" -

> "This code section establishes a rule of construction, sometimes referred to as a presumption [citations] with respect to the effect of a deed conveying property as bounded by a street. [citations] *Application of the rule is limited to a deed containing a description wherein the street as such is used as a boundary." Speer v. Blasker* (1961) 195 Cal. App. 2d 155. Emphasis added.

Clearly, with regard to C.C. § 1112 the court of Appeal is in error by holding that pursuant to this presumption;

> " . . . at the time of the original subdivision, lots H, I. J and U included half of the adjacent alley." MOP., p. 16, Appendix "C".

That presumption [§ 1112] is only applicable to a situation involving the effects of a deed conveying property as being bounded by a street. C.C. § 1112 has nothing to do, as the Court of Appeal believes, with uniting lots and alleys at the time of the original subdivision of property.

If this decision is upheld then every property owner in the State of California owning property adjacent to a highway, street or alley really owns one-half of that highway, street or alley regardless of what their deeds may say. This is not the law of this state.

POINT II

THE LOWER COURT INCORRECTLY INTERPRETED THE APPLICATION OF STREET AND HIGHWAY CODE § 8351 CONCERNING THE EFFECT OF VACATION OF STREETS/ALLEYS ON FEE TITLE.

§ 8351 of the California Street and Highway Code reads in pertinent part as follows:

Effect of Vacation on Title

> "(a) If the public entity owns only an easement for the street, highway or public service purpose, title to the property previously subject to the easement is thereafter free from the easement for use for street, highway, or public service purposes . . . "

In other words, the government authority merely surrenders the rights which have been acquired by the public. *Severo v. Pacheco* (1946) 75 C.A. 2d 30, 34; *Swift v. Board of Supervisor* (1911) 16 C.A. 72, 77.

The Court of Appeal opines:

> "In 1925, the County vacated and abandoned the Snakewall streets and alleys. As a result, those portions of lots H, I, J and U which were subject to the public easement (i.e., one-half of each portion of the adjacent alley) reverted to those lots." Appendix "C", MOP, p 16.

The Court of appeal believes that the vacating and abandoning of streets and alleys has an effect upon fee ownership of the land which is diametrically opposed to not only case law, but specifically § 8351 of the Street and Highway Code.

The Court of Appeal correctly opines:

> "When a street in a subdivision is dedicated to the government, the public generally acquires *only an easement* for the right of way; Appendix "C", MOP, p 15. Emphasis added.

Also, see *Facts*, Appendix "C", MOP, p2, wherein the Court notes in the case at bar:

> " . . . several streets and alleys which were dedicated to the County for public use."

It is elementary that an 'easement' is essentially the right to the use of land, fee owned by another; it is not fee title to the land itself.

Therefore, it is also elementary that if that right to the use of the land, i.e. dedication, is returned to the fee owner of the land the only result which occurs is the then fee owner merely gets by vacation "possession and occupancy" at the time of said vacation. The fee title to the land is not affected because it was only the right to use the land which was given in the first place.

So it is with dedications and abandonments. The owner of the property when it was subdivided into lots and streets and alleys still owned the property in fee at the time of subdivision; it was merely subdivided into lots, streets and alleys; and said subdivision had no effect upon his fee title ownership.

The Court opines:

> "Smith presented no evidence to show the original subdivider had any other intent. Thus, at the time of the original subdivision, lots H, I, J and U included half of the adjacent alley." Appendix "C", MOP, p16.

Contrary to the Court's above opinion C.C. §§ 831 and 1112 presumptions are only applied to conveyances *and not to any "intent" at the time of subdivision.*

In any event Smith's "contrary intent" expressed in the sales escrow instructions (lots H, I, J and U) and deeds (lots H, I, and J) rebut the C.C. § 831 and 1112 presumptions as the Court opines:

> "In the 1980's, when Smith sold Hots H, I, J and U, he retained the alley portions of lots H, I, J and U." Appendix "C", MOP, p17.

Also, see Appendix "C", MOP, p 3, FACTS, which further acknowledges Smith's expression of a "contrary intent" regarding the vacated streets/alleys.

POINT III

THIS CASE INVOLVES RECORDED NOTICES OF VIOLATION OF ILLEGAL SUBDIVISION, LOTS H, I AND J, MAP NO. 1285, DATED 10/30/90, AND LOT U, MAP 1343, DATED 1/14/91

Appendix "B" OP and Appendix "C" MOP, FACTS, p 2, line one states:

> "This case involves a 20-acre property in Del Mar known as the Snakewall Property."

Petitioner's "Petition for Rehearing" filed on 5/5/93 at p 2, No. A-1, advised the lower court of this material misstatement. This "misstatement" was not corrected by the "Order Modifying Opinion", Appendix "B", pp 1 and 2.

Accordingly, Appendix "C", MOP, FACTS, *first sentence reflects* an Opinion prefaced from the beginning with *a glaring material fact misstatement.*

POINT IV

REQUEST FOR STAY

Petitioner/Appellant Smith is the Defendant in Case No. D017058/N49451 currently pending in the Fourth District Court of Appeals. In connection with that case, lots H, I and J Owners/Plaintiffs, obtained a "rescission" money judgment against Appellant and have pending an Order to Show Cause Motion why Appellant's Del Mar residence, lots and vacated streets/alleys should not be sold. That 'Order to Show Cause Motion' is scheduled for a June 1, 1993 "telephonic ruling" in Dept. M, North County Superior Court.

If said 'Motion' is granted it will cause Petitioner/Appellant Smith to suffer irreparable injury for which there will be no adequate remedy at law.

Appendix "D", pp 1-15 sets forth pertinent facts concerning the 6/1/93 "Telephonic Ruling" pursuant to the Honorable Thomas R. Murphy's Order of 4/14/93 at pp 14-15 of Appendix "D".

Wherefore, Appellant respectfully prays that:

This Court grant the requested "Stay" of 'Order to Show Cause Motion,' 6/1/93 "Telephonic Ruling"; and for such other further relief as this Court deems just and proper.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant this petition for review and order the within appeal transferred to it; **OR** summarily reverse the lower Court's Opinion with appropriate instructions based on the laws of the State of California heretofore briefed in This Case and related pending Case Nos. D017058; D017742 and D018419.

Respectfully Submitted,

/s/ JAMES E. SMITH
JAMES E. SMITH
Propria Persona for Petitioner

Dated: May 27, 1993

ATTACH. "A"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES E. SMITH, Plaintiff and Appellant, v. THE CITY OF DEL MAR et al., Defendants and Respondents.	)	D015814 (Super. Ct. No. N50142) (Filed April 27, 1993)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

James E. Smith appeals the denial of his petition for a writ of mandate under Code of Civil Procedure section 1094.5 to compel the City of Del Mar (the City) to set aside a determination Smith sold lots in violation of the Subdivision Map Act (Gov. Code, § 66410 et seq.). On appeal, Smith contends the superior court erroneously concluded Smith had failed to provide an adequate administrative record, applied the wrong standard of review, incorrectly determined Smith had illegally subdivided land and erred in failing to find the City was estopped to assert the illegal subdivision. We affirm.[1]

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[1] The City contends Smith's appeal is defective and should be denied because Smith's opening brief "contains no statement of facts or any discussion of the evidence on the points raised"

FACTS

This case involves a 20-acre property in Del Mar known as the Snakewall property. Between 1910 and 1913, the property was subdivided into 20 lots. The subdivision also contained several streets and alleys which were dedicated to the county for public use. Lots H, I and J bordered an alley. Lot U bordered a street. The subdivision is depicted in a series of maps showing the various lots and a number of streets and alleys bisecting the subdivision and lying adjacent to the various lots. The subdivision maps do not contain any metes and bounds descriptions of the particular lots but only a graphic representation of the lots and their location.

In 1925, the county vacated and abandoned the streets and alleys contained in the Snakewall subdivision.

Smith bought the property in 1977. At the time he bought the property, the 20 lots had been merged into one

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and his presentation during his discussion is "totally one-sided." An appellate court is not required to review a claim based on the sufficiency of the evidence when the appellant, who bears the burden of showing error, fails to set forth a fair and adequate statement of the evidence, with citations to the record which is claimed to be insufficient. (*Maggio, Inc. v. United Farm Workers* (1991) 227 Cal.App.3d 847, 878; see also Cal. Rules of Court, rule 13.) We decline the City's invitation to find Smith's appeal "defective." We note the City has mischaracterized Smith's opening brief. He did not totally fail to set out a statement of facts. He set forth facts, with citations to the record. While his statement is not always clear, nor necessarily limited to a fair presentation or to the relevant evidence, we do not find its deficiencies sufficient to preclude a review on the merits, especially since the relevant facts on the primary issue are largely undisputed and involve more a matter of law than fact.

or two lots. The property was unmerged in 1985 and the original subdivision was reinstated. In 1987, the City passed a resolution stating, inter alia: "The Snakewall Property is comprised of 20 lots of record which can be developed in accordance with the Municipal Code." (City of Del Mar Resolution No. 87-71.)

In 1988, Smith sold Lots H, I and J by the lot number on the 1910 subdivision map but specifically excluded "that portion of the alley adjoining said [lot H, I or J] as closed to public use." In 1989, Smith sold lot U by reference to the 1911 subdivision map but excluded the adjacent street. In 1990, Smith sold other lots (including lots L, M and N) by referring to the original subdivision maps but specifically excluding the adjacent alley. Smith apparently contemplated adding parts of the vacated streets to various other lots.

In June 1990, the City's planning director, senior planner and assistant planner met with Smith and his project manager and discussed, among other things, problems created by Smith's retention of the streets and alleys and the possibility of Smith granting the adjacent alleys and streets back to the purchasers.

In September 1990, the buyers of lots H, I and J filed applications with the City to obtain certificates of compliance. The City planning staff concluded lots H, I and J of the original subdivision had included the adjacent alley to its centerline and that Smith's retention of the alley portion of the lots had resulted in an illegal subdivision. The staff recommended the City issue conditional certificates of compliance for the "New" lots H, I and J [i.e., the lots minus the adjacent alley portion created by the 1988

sales as opposed to the "Old" lots of the original subdivision] subject to the following condition:

> "Prior to the issuance of a permit or other grant of approval for development of the properties, the portions of the alley, vacated by the County, and retained by the seller, during the [1988] sale must be acquired and added to the New Lots in question. Or in the alternative, a parcel map or subdivision map shall be accomplished to show the alley as separate and a part from the New Lot."

The hearing for the certificate of compliance applications was held on September 24, 1990. Smith was given notice of the hearing as the owner of a neighboring lot, appeared at the hearing, was specifically asked if he wished to speak but declined to do so. The planning director determined lots H, I, and J had been created in violation of the Subdivision Map Act.

In late September and early October 1990, the City notified the owners of lots H, I J, L, M and N who had purchased lots without the adjacent street or alley that the City intended to record a notice of violation. The notice stated the owners had 15 days to respond to the notice and a failure to respond would be construed as a waiver of the right to object and the City would record the notice of violation. The attorney for the owners of H, I and J wrote the City confirming a request to continue the hearing to November 12, 1990 but concluding that since the "Owners have no additional evidence that might persuade the City that Lots H, I, and J as conveyed to the Owners are not illegal lots, the Owners have no basis to object to the recording of the notices of violation." The

City recorded notices of violation as to Lots H, I and J on October 30, 1990.

Before the scheduled hearing date, Smith deeded the adjacent portions of the alley which he had retained to the owners of lots L, M and N. Smith also offered to transfer the alley portions to the owners of lots H, I and J to negate the violations, but the owners of these lots refused to accept the transfers, electing to proceed instead with their own legal actions. Smith had confirmed with the City's engineer that transfer of the alleys to buyers would "solve [the] problem."

Smith objected to the filing of the notices of violation on lots H, I and J and submitted written material opposing the recording of notices of violation. A hearing was scheduled on November 19, 1990 to allow Smith an opportunity to be heard on the issue. The owners of Lots H, I and J wrote the City complaining Smith was not an owner of record and therefore was not entitled to a hearing on the filing of the notices of violation.

Smith spoke at the November 19, 1990 hearing, asserting he had a right to apportion lots by deed and that he had not violated the Subdivision Map Act. At the end of the hearing, the City voted to uphold the filing of the notices of violation.

In December 1990, the City notified the owner of lot U of its intention to file a notice of violation. A hearing before the City Council was begun on January 12, 1991. Smith was present at this hearing and presented written materials. The hearing was continued to February 4, 1991.

On January 28, 1991, before the scheduled hearing in February 1991, Smith filed a petition for writ of mandate seeking to compel the City to aside the notices of violation. Smith alleged the City's decision violated California statutory and decisional law; was "based on an incomplete, inaccurate and inconsistent record"; was "motivated by political reasons to stop development at the Snakewall property"; and was not supported by the evidence presented to the City. Smith also contended the City should be estopped and that he was denied his due process right to notice and an opportunity to be heard.

Smith did not attend the February 4, 1991 hearing. At the end of the hearing, the City Council voted to record a notice of violation on lot U.

In support of his petition for a writ of mandate and a motion for summary judgment, Smith submitted Exhibits A through QQQ. These exhibits consisted of various uncertified documents of the City, uncertified audio recordings of hearings, various deeds, notices and other documents. Smith never requested the City to prepare an administrative record. The City objected to all Smith's exhibits on the basis the probative value was outweighed by an undue consumption of time and "attempted confusion of issues." The City also made specific objections to most of the exhibits on the grounds of lack of foundation, lack of certification, hearsay and relevancy. In opposition to Smith's motion for summary judgment, the City lodged 35 exhibits which had been certified by the city clerk. The city clerk declared these exhibits did not constitute the full administrative record.

The superior court judge found Smith had failed to present an adequate administrative record and denied his petition on that basis. The judge, however, also rejected Smith's arguments on the merits.

DISCUSSION

I

Adequacy of Administrative Record

The City contends the court properly denied Smith's petition for writ of mandate on the basis he failed to provide an adequate administrative record. The City contends because Smith failed to present the entire administrative record, "this court lacks the necessary record to render any decision other than an affirmance of the lower court's decision."

Code of Civil Procedure section 1094.5 authorizes review by the superior court to determine "the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer. . . ." (Code Civ. Proc., § 1094.5, subd. (a).) The inquiry "shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the

findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).)

Smith, as the petitioner, had the burden of showing error and of producing an adequate record to support his claim of error. (See *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 453; *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 798, fn. 4.)

Code of Civil Procedure section 1094.5 states "[a]ll or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court." (Code Civ. Proc., § 1094.5, subd. (a).)

The City argues because Smith was challenging the sufficiency of the City's findings and because his claim must be reviewed on a substantial evidence basis, Smith was required to provide the entire administrative record to the court. In support of this position, the City cites *Hothem v. City and County of San Francisco* (1986) 186 Cal.App.3d 702. In *Hothem*, the petitioner challenged the city's characterization his building was a residential hotel. The petitioner placed in evidence before the court only three of his own declarations supporting his position and failed to produce any other part of the administrative record. The *Hothem* court first noted the parties agreed that it was required to " 'review the *entire administrative record* to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law. . . . " (*Id.* at p. 704.) The court rejected the petitioner's argument he was only required to provide an "adequate record," explaining: "since the

superior court, as noted, is required to determine whether the administrative findings and decision 'are supported by substantial evidence in the light of the *whole record*' (our italics), an *adequate* record necessarily embraces the *'whole record.'* " (*Id.* at p. 705, emphasis in original.)

Here, Smith neither provided the entire record nor an adequate record. He never requested the City clerk to prepare the administrative record and the documents he provided were clearly inadequate because they consisted of not only uncertified documents but documents which were not presented at the administrative hearing.[2] The court, however, had before it much of the pertinent administrative hearing because the City lodged certified copies of part of the administrative record. The fact this record was provided by the City rather than Smith does not support rejecting Smith's claims in their entirety. Smith's principle claim – that he was entitled to retain the alley portion of the lots without violating the Subdivision Map Act – involves primarily a question of law based on undisputed facts. The record provided by the City was sufficient to for a review of this claim. (See *Anderson v.*

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[2] Smith contends the court erred in failing to grant him a continuance so he could file the complete administrative record with the court. Whether to grant a continuance was in the discretion of the court. (See *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1280; *In re Marriage of Johnson* (1982) 134 Cal.App.3d 148, 154.) We find no abuse of discretion. Smith did not seek a continuance to obtain the complete record until the day of the hearing even though he had earlier notice the City was opposing the petition on the ground Smith had failed to obtain the administrative record.

City of La Mesa (1981) 118 Cal.App.3d 657, 660.) Others of Smith's claims, however, are impacted by his failure to provide the complete record both below and here on appeal as we point out in our subsequent discussion.

II

Standard of Review

Smith contends the court erred in applying a substantial evidence test when reviewing the City's determination Smith had violated the Subdivision Map Act. Smith contends the court should have exercised its independent judgment in reviewing the record.

Code of Civil Procedure section 1094.5, subdivision (c) provides:

> "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

The trial court is required to exercise its independent judgment when the decision substantially affects a fundamental vested right. (*Patterson v. Central Coast Regional Com.* (1976) 58 Cal.App.3d 833, 840.)

Smith contends the court should have applied the independent judgment test because he "had a 'statutory

fundamental vested right' to convey lots H, I, J and U as the government had approved them on the Final Subdivision Map[s]" of 1910 to 1913. As we point out in our discussion of the Subdivision Map Act in part III, Smith here did not convey the lots as they existed in the original subdivision; he created new lots by retaining the street and alley portions of the lots. Even granting Smith's premise, this case does not involve a fundamental vested right. We conclude the lower court applied the correct standard of review.[3]

III
Subdivision Map Act

The objective of the Subdivision Map Act is "to regulate and control the design and improvement of subdivisions." (*Pratt v. Adams* (1964) 229 Cal.App.2d 602, 606.) "Subdivision" is defined as:

> "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future except

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[3] We note even if we were to conclude the court should have exercised its independent judgment when reviewing the administrative record, we would not reverse. The critical evidence on the key issue in this case was not disputed, i.e., what actions Smith took in selling lots H, I, J and U and the City's response. The court's decision rested on an interpretation of the law, rather than weighing and resolving conflicting facts. Had the court applied an independent judgment test, the result would have been the same.

> for leases of agricultural land for agricultural purposes. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement or railroad rights-of-way. . . . " (Gov. Code, § 66424.)[4]

Under the Act, before an owner may legally subdivide property for the purpose of sale, lease or financing, he generally must obtain approval of either a subdivision

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[4] Smith spent much of his brief arguing he did not illegally subdivide the lots based on his interpretation of the county assessment roll which he asserts shows the lots without the adjacent streets. First, we note there is no indication this assessment roll was before the City during the administrative hearings nor any showing why it Could not have been presented to the City during the hearings and therefore is not part of the record on review. Second, the assessment roll is not necessarily determinative. As one authority has explained: "The phrase 'latest equalized county assessment roll' was included in the Subdivision Map Act's definition of 'subdivision' (Govt C § 66424) to provide a convenient method of identifying the property being divided and its ownership during a given period of time. [Citation.] It is often misunderstood as permitting the owner to convey assessor's parcels without first obtaining a subdivision map. The assessor's parcel designations have no effect on application of the Map Act, however, and owners may not divide land along the lines of the assessor's parcels for the purpose of sale, lease, or financing without obtaining a subdivision map. The function and purpose of the assessor is to raise revenue and not to regulate the division of land. [Citations.]" (Cal. Subdivision Map Act Practice (Cont.Ed.Bar 1987) § 2.6, p. 24.)

Finally, we note the assessor's roll shows the same streets and alleys as contained in the original subdivision maps and thus, under the Civil Code presumptions, the adjacent lots include half the adjoining streets and alleys.

or parcel map.[5] (See Gov. Code, §§ 66426, 66428.) Certain lot line adjustments, however, do not require filing a parcel or subdivision map.

Government Code section 66412, which governs exceptions to the map requirements, in pertinent part, provides:

> "This division [i.e., the Subdivision Map Act] shall be inapplicable to:
>
> " .....
>
> "(d) A lot line adjustment between two or more existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created, provided the lot line adjustment is approved by the local agency, or advisory agency. A local agency or advisory agency shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to local zoning and building ordinances. An advisory agency or local agency shall not impose conditions or exactions on its approval of a lot line adjustment except to conform to local zoning and building ordinances, to require the prepayment of real property taxes prior to the approval of the lot line adjustment, or to facilitate the relocation of existing utilities, infrastructure, or easements. No tentative map, parcel map, or final map shall be required as a

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[5] A subdivision map is required if the subdivision creates more than five new units; a parcel map if less than five units are created.

> condition to the approval of a lot line adjustment. The lot line adjustment shall be reflected in a deed, which shall be recorded. No record of survey shall be required for a lot line adjustment unless required by Section 8762 of the Business and Professions Code."

The City has adopted an ordinance addressing lot line adjustments which provides:

> "Notwithstanding any other provisions of this Title to the contrary, every person desiring to adjust a legal lot line between two or more adjacent lots, where the land taken from one lot is added to an adjacent lot, without creating a greater number of lots, shall comply with the procedures set forth in this Chapter for obtaining a parcel map for lot line adjustment." (Del Mar City Ordinance, § 24.70.010.)

Under the Subdivision Map Act, if a local agency "has knowledge that real property has been divided in violation of the [Subdivision Map Act] or local ordinances enacted pursuant [to the Act], it shall cause to be mailed . . . a notice of intention to record a notice of violation. . . . " (Gov. Code, § 66499.36.) The local agency is required to give the property owner notice and an opportunity for a hearing. (Gov. Code, § 66499.36.) If the local agency determines there has been a violation of the Subdivision Map Act, it is required to file a notice of violation which "when recorded, shall be deemed to be constructive notice of the violation to all successors in interest in such property." (Gov. Code, § 66499.36.)

The Subdivision Map Act prohibits transactions in violation of the Act (Gov. Code, § 66499.30) and provides that a person who violates any provision of the Act is

guilty of a misdemeanor or felony (Gov. Code, § 66499.31). The Act also provides various remedies for violations of the Act or local ordinance enacted pursuant to the Act, including allowing the purchaser of a lot sold in violation to void the sale and seek damages "suffered by reason of such division of property" and permitting the local agency to seek other legal, equitable or summary remedies including an injunction to restrain any attempted or proposed subdivision or sale in violation of the Act. (Gov. Code, §§ 66499.32, 66499.33.) Further, the Act bars a local agency from issuing a permit or granting approval necessary to develop real property which has been divided in violation of the Act. (Gov. Code, § 66499.35.)

IV

The Snakewall Property Lot Lines

Smith contends he did not subdivide any land or violate the Subdivision Map Act by retaining title to the alleys adjoining lots H, I, J and U because the alleys were not part of the lots at the time he sold the lots.

Under California law, it is presumed a person owning land adjacent to a road owns the land to the center of the road unless the contrary is shown. (Civ. Code, § 831.) This presumption " 'is highly favored in the law.' " (*Machado v. Title Guarantee and T. Co.* (1940) 15 Cal.2d 180, 183; *Pilkington v. Fausone* (1970) 11 Cal.App.3d 349, 351-352.) Civil Code section 1112 further provides that when a person transfers land adjacent to a road, it is presumed he transfers title to the center of a road unless

the grant shows a different intent. Under the presumption of Civil Code section 1112, if a property owner sells a lot adjacent to a road by referring to a recorded map, the buyer generally acquires title to the centerline of the adjoining street. (*Neff v. Ernst* (1957) 48 Cal.2d 628, 635; *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1132.)

When a street in a subdivision is dedicated to the government, the public generally acquires only an easement for the right of way; an adjacent landowner who owns the fee title to the center of the street retains the fee interest but has no right to possession or occupancy of any portion of the street. (*Safwenberg v. Marquez* (1975) 50 Cal.App.3d 301, 307-308; *Baker v. Ramirez, supra,* 190 Cal.App.3d 1123, 1132.) If the government vacates or abandons the street, then ownership reverts to the fee owners, usually the adjacent landowners. (*Baker v. Ramirez, supra,* 190 Cal.App.3d 1123, 1132; *Severo v. Pacheco* (1946) 75 Cal.App.2d 30, 34; Miller & Starr, Cal. Real Estate (2d ed. 1989) § 15.80, p. 605.)

"The policy behind the law is to avoid ownership in land in strips and gores by attaching the underlying fees of streets, both active and abandoned, to the adjoining lots." (*Safwenberg v. Marquez, supra,* 50 Cal.App.3d 301, 306.)

Here, the Snakewall subdivision of 1910 to 1913 contained various streets and alleys which were dedicated to the County of San Diego. Under the Civil Code, it is presumed each lot in the Snakewall subdivision which was adjacent to a street or alley extended to the centerline of the street or alley subject to the public's easement to use the streets and alleys. Smith presented no evidence to

show the original subdivider had any other intent. Thus, at the time of the original subdivision, lots H, I, J and U included half of the adjacent alley.

In 1925, the county vacated and abandoned the Snakewall streets and alleys. As a result, those portions of lots H, I, J and U which were subject to the public easement (i.e., one-half of each portion of the adjacent alley) reverted to those lots. (See, e.g., *Pilkington v. Fausone, supra,* 11 Cal.App.3d 349, 351-352.)

In the 1980's, when Smith sold lots H, I, J and U, he retained the alley portions of lots H, I, J and U. He thus subdivided the lots, creating new units of land by dividing the alley portions from the adjacent lots. These were not mere lot line adjustments, exempted from the requirement of filing a parcel or subdivision map (§ 66412, subd. (d)), because Smith did not merely adjust the lot lines among the lots creating no new parcels; he created new parcels, i.e., the alley units which he had retained when he sold the lots. (Contrast *San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748 (readjustment of lot lines of nine parcels so that all could have frontage on road).) Smith further violated the Subdivision Map Act by failing to obtain government approval for his changes in the lots lines. (§ 66412, subd. (d).)

V

Denial of Due Process

Smith contends he was denied his constitutional right to due process because he was not provided with adequate notice and opportunity to be heard on the issue of

the Subdivision Map Act violations as to lots H, I, J and U.

Smith waived this claim by failing to provide the entire administrative record. Necessarily, a claim which rests on the absence or inadequacy of notice and an opportunity to be heard requires an individual to provide the entire record. Moreover, the partial record provided by the City contradicts Smith's claim. The partial record provided by the City shows the City communicated its concern about the sales of the Snakewall lots without the adjacent streets and alleys by June 1990, several months before the City began the process resulting in the filing of the notices of violation. Smith received notice, as an adjacent lot owner, of the September 24, 1990 hearing on the certificates of compliance for Lots H, I and J. Smith attended the meeting and was specifically asked if he wanted to speak but declined to do so. Later, the City held another hearing on the certificates of compliance for Lots H, I and J to allow Smith an opportunity to be heard. Smith spoke at the meeting held in November 1988. The record also indicates Smith had notice of the hearing on the certificate of compliance for lot U since he both attended the hearing and submitted written materials.

There is no support in the record that Smith was denied notice or an opportunity to be heard on the notices of violation imposed on lots H, I, J and U.

VI

Estoppel

Smith contends the City should be estopped from recording the notices of violation against lots H, I, J and U.

"[The] doctrine of equitable estoppel has four elements: (1) The party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.]" (*Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884, 890.) When estoppel is sought against the government, the court must consider whether the application of the estoppel doctrine will significantly effect any important public policies and weigh any potential frustration of a public policy against the hardship suffered by the person seeking estoppel. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) (*In re Marriage of Valle* (1975) 53 Cal.App.3d 837, 840-841.) A claim of estoppel must be formally raised at the administrative level or it is barred. (*Pittsburg Unified School Dist. v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 980.)

Here, like the due process issue, Smith has failed to establish his estoppel claim by failing to present a complete administrative record; without the whole record there can be no complete picture of the City's conduct which might support an estoppel claim. Further, Smith has failed to establish he raised the estoppel issue at any time during the administrative process. Finally, we find no merit to Smith's claim of estoppel.

On appeal, Smith argues lots H, I, J and U were lawfully created and reflected in the recorded 1910-1913 subdivision maps and therefore the government, "[having] duly approved" of the subdivision, "in essence" gave the owner of the subdivided lots a "permit" to sell the

lots, a permit which "constituted a promise by the government of the County of San Diego to the owner of those lots and his successors-in-interest that the government would not prohibit him/them from selling . . . those lots as subdivided per the governmental approval." Smith contends he bought the Snakewall property in reliance upon the validity of the 1910-1913 subdivision maps[6] and suffered detriment when the City filed the notices of violation.

Smith contends that "if there ever was to be an attempt by the government to prohibit or restrict that right, then it would have to be at least for a compelling state interest since the right was fundamental and vested," no such compelling state interest exists in this case and application of estoppel against the City would further the public policy, i.e., "the rights of the citizenry to be able to rely and depend upon promises and assurances by the government."

The underlying premise of this argument is faulty. As we have already explained, while Smith may have had a vested right to sell the lots as reflected in the 1910-1913 subdivision, that is not what he did when he sold lots H, I, J and U. When he sold those lots without the adjacent alley portion, he created different lots than those that existed in the 1910-1913 subdivision. There were no promises by the government that he could sell the new

---

[6] We note this statement seems to be contradicted by evidence that at the time Smith bought the Snakewall property in 1979, the 20 lots had been merged so he did not have the right to sell, lease or finance the lots of the original 1910-1913 subdivision.

lots H, I, J and U that he created in 1988 and 1989, therefore it cannot be said he acted in reliance on a governmental promise. Estoppel does not apply in this case.

DISPOSITION

The judgment is affirmed.

/s/ Kremer
KREMER, P.J.

WE CONCUR:

/s/ Wiener
WIENER, J.

/s/ Todd
TODD, J.

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ATTACH "B"

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES E. SMITH, Plaintiff and Appellant, v. THE CITY OF DEL MAR et al., Defendants and Respondents.	D015814 (Super. Ct. No. N50142) ORDER MODIFYING OPINION [No Change in Judgment] (Filed May 17, 1993)

THE COURT:

The opinion filed April 27, 1993, is modified as follows:

On page 2, a footnote is added to the end of the second sentence in the FACTS section to read: The subdivision of the Snakewall property was accomplished through three subdivision maps which not only created the 20 lots within the Snakewall property but also many other lots in Del Mar. For the sake of convenience, we use the singular "subdivision" when referring to the 20 lots within the Snakewall property.

On page 2, a footnote is added after the sentence "Lot U bordered a street" to read: Lots H, I, J and U also bordered other streets which are not at issue here and which will not hereafter be referred to.

On page 2, the last sentence of the first full paragraph is changed to read: The subdivision maps do not contain any metes and bounds descriptions of the particular lots but contain a graphic representation and numerical measurements of the lots and their locations.

On page 3, the second sentence of the second paragraph on page 3 is changed to read: At the time he bought the property, the 20 lots had been merged into one parcel.

On page 3, the date of 1990 in the third sentence of the third paragraph is changed to read: 1987 and 1988.

On page 5, the word "scheduled" is deleted from the first sentence of the first full paragraph.

On page 5, the end of the last sentence in the third full paragraph is changed to add: (strip portions).

On page 6, the date in the first line of the page is changed from "on January 12, 1991" to read: in January 1991.

Footnotes should be renumbered accordingly.

As modified, the petition for rehearing is denied.

There is no change in the judgment.

/s/ Kremer
KREMER, P.J.

Copies to: All parties

ATTACH "C"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES E. SMITH Plaintiff and Appellant, v. THE CITY OF DEL MAR et al., Defendants and Respondents.	**ORDER OPINION AFTER MODIFIED ON MAY 17, 1993 BY COURT OF APPEAL FOURTH DISTRICT** D015814 (Super. Ct. No. N50142)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

James E. Smith appeals the denial of his petition for a writ of mandate under Code of Civil Procedure section 1094.5 to compel the City of Del Mar (the City) to set aside a determination Smith sold lots in violation of the Subdivision Map Act (Gov. Code, § 66410 et seq.). On appeal, Smith contends the superior court erroneously concluded Smith had failed to provide an adequate administrative record, applied the wrong standard of

review, incorrectly determined Smith had illegally subdivided land and erred in failing to find the City was estopped to assert the illegal subdivision We affirm.[1]

FACTS

This case involves a 20-acre property in Del Mar known as the Snakewall property. Between 1910 and 1913, the property was subdivided into 20 lots.[2] The subdivision also contained several streets and alleys which were dedicated to the county for public use. Lots

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[1] The City contends Smith's appeal is defective and should be denied because Smith's opening brief "contains no statement of facts or any discussion of the evidence on the points raised" and his presentation during his discussion is "totally one-sided." An appellate court is not required to review a claim based on the sufficiency of the evidence when the appellant, who bears the burden of showing error, fails to set fourth a fair and adequate statement of the evidence, with citations to the record which is claimed to be insufficient. (*Maggio, Inc. v. Untied* [sic] *Farm Workers* (1991) 227 Cal. App. 3d 847, 878; see also Cal. Rules of Court, rule 13.) We decline the City's invitation to find Smith's appeal "defective." We note the City has mischaracterized Smith's opening brief. He did not totally fail to set out a statement of facts. He set forth facts, with citations to the record. While his statement is not always clear, nor necessarily limited to a fair presentation or to the relevant evidence, we do not find its deficiencies sufficient to preclude a review on the merits, especially since the relevant facts on the primary issue are largely undisputed and involve more a matter of law than fact.

[2] The subdivision of the Snakewall Property was accomplished through three subdivision maps which not only created the 20 lots within the Snakewall Property, but also many other lots in Del Mar. For the sake of convenience, we use the singular "subdivision" when referring to the 20 lots within the Snakewall Property.

H, I and J bordered an alley. Lot U bordered a street.[3] The subdivision is depicted in a series of maps showing the various lots and a number of streets and alleys bisecting the subdivision and lying adjacent to the various lots. The subdivision maps do not contain any metes and bounds descriptions of the particular lots but **contain** a graphic representation **and numerical measurements** of the lots and their location.

In 1925, the county vacated and abandoned the streets and alleys contained in the Snakewall subdivision.

Smith bought the property in 1977. At the time he bought the property, the 20 lots had been merged into **one parcel.** The property was unmerged in 1985 and the original subdivision was reinstated. In 1987, the City passed a resolution stating inter alia: "The Snakewall Property is comprised of 20 lots of record which can be developed in accordance with the municipal Code." (City of Del Mar Resolution No. 87-71.)

In 1988, Smith sold Lots H, I and J by the lot number on the 1910 subdivision map but specifically excluded "that portion of the alley adjoining said [lot H, I or J] as closed to public use." In 1989, Smith sold lot U by reference to the 1911 subdivision map but excluded the adjacent street. In **1987 and 1988,** Smith sold other lots (including lots L, M and N) by referring to the original subdivision maps but specifically excluding the adjacent alley. Smith apparently contemplated adding parts of the vacated streets to various other lots.

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[3] Lots H, I, J and U also bordered other streets which are not at issue here and which will not hereafter be referred to.

In June 1990, the City's planning director, senior planner and assistant planner met with Smith and his project manager and discussed, among other things, problems created by Smith's retention of the streets and alleys and the possibility of Smith granting the adjacent alleys and streets back to the purchasers. In September 1990 the buyers of lots H, I and J filed applications with the City to obtain certificates of compliance. The City planning staff concluded lots H, I and J of the original subdivision had included adjacent alley to its centerline and that Smith's retention of the alley portion of the lots had resulted in an illegal subdivision. The staff recommended the City issue conditional certificates of compliance for the "New" lots H, I and J [i.e., the lots minus the adjacent alley portion created by the 1988 sales as opposed to the "Old" lots of the original subdivision] subject to the following condition:

> "Prior to the issuance of a permit or other grant of approval for development of the properties, the portions of the alley, vacated by the County, and retained by the seller, during the [1988] sale must be acquired and added to the New Lots in question. Or in the alternative, a parcel map or subdivision map shall be accomplished to show the alley as separate and a part from the New Lot."

The hearing for the certificate of compliance applications was held on September 24, 1990. Smith was given notice of the hearing as the owner of a neighboring lot, appeared at the hearing, was specifically asked if he wished to speak but declined to do so. The planning director determined lots H, I, and J had been created in violation of the Subdivision Map Act.

In late September and early October 1990, the City notified the owners of lots H, I J, L, M and N who had purchased lots without the adjacent street or alley that the City intended to record a notice of violation. The notice stated the owners had 15 days to respond to the notice and a failure to respond would be construed as a waiver of the right to object and the City would record the notice of violation. The attorney for the owners of H, I and J wrote the City confirming a request to continue the hearing to November 12, 1990 but concluding that since the "Owners have no additional evidence that might persuade the City that Lots H, I, and J as conveyed to the Owners are not illegal lots, the Owners have no basis to object to the recording of the notices of violation." The City recorded notices of violation as to Lots H, I and J on October 30, 1990.

Before the hearing date, Smith deeded the adjacent portions of the alley which he had retained to the owners of lots L, M and N. Smith also offered to transfer the alley portions to the owners of lots H, I and J to negate the violations, but the owners of these lots refused to accept the transfers, electing to proceed instead with their own legal actions. Smith had confirmed with the City's engineer that transfer of the alleys to buyers would "solve [the] problem."

Smith objected to the filing of the notices of violation on lots H, I and J and submitted written material opposing the recording of notices of violation. A hearing was scheduled on November 19, 1990 to allow Smith an opportunity to be heard on the issue. The owners of Lots H, I and J wrote the City complaining Smith was an

owner of record and therefore was not entitled to a hearing on the filing of the notices of violation.

Smith spoke at the November 19, 1990 hearing, asserting he had a right to apportion lots by deed and that he had not violated the Subdivision Map Act. At the end of the hearing, the City voted to uphold the filing of the notice of violation **(strip portions).**

In December 1990, the City notified the owner of lot U of its intention to file a notice of violation. A hearing before the City Council was begun **in January 1991.** Smith was present at this hearing and presented written materials. The hearing was continued to February 4, 1991.

On January 28, 1991, before the scheduled hearing in February 1991, Smith filed a petition for writ of mandate seeking to compel the City to aside the notices of violation. Smith alleged the City's decision violated California statutory and decisional law; was "based on an incomplete, inaccurate and inconsistent record"; was "motivated by political reasons to stop development at the Snakewall property"; and was not supported by the evidence presented to the City. Smith also contended the City should be estopped and that he was denied his due process right to notice and an opportunity to be heard.

Smith did not attend the February 4, 1991 hearing. At the end of the hearing, the City Council voted to record a notice of violation on lot U.

In support of his petition for a writ of mandate and a motion for summary judgment, Smith submitted Exhibits A through QQQ. These exhibits consisted of various uncertified documents of the City, uncertified audio

recordings of hearings, various deeds, notices and other documents. Smith never requested the City to prepare an administrative record. The City objected to all Smith's exhibits on the basis the probative value was outweighed by an undue consumption of time and "attempted confusion of issues." The City also made specific objections to most of the exhibits on the grounds of lack of foundation, lack of certification, hearsay and relevancy. In opposition to Smith's motion for summary judgment, the City lodged 35 exhibits which had been certified by the city clerk. The city clerk declared these exhibits did not constitute the full administrative record.

The superior court judge found Smith had failed to present an adequate administrative record and denied his petition on that basis. The judge, however, also rejected Smith's arguments on the merits.

DISCUSSION

I

Adequacy of Administrative Record

The City contends the court properly denied Smith's petition for writ of mandate on the basis he failed to provide an adequate administrative record. The City contends because Smith failed to present the entire administrative record, "this court lacks the necessary record to render any decision other than an affirmance of the lower court's decision."

Code of Civil Procedure section 1094.5 authorizes review by the superior court to determine "the validity of any final administrative order or decision made as the

result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer. . . ." (Code Civ. Proc., § 1094.5, subd. (a).) The inquiry "shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, SUBD. (B).)

Smith, as the petitioner, had the burden of showing error and of producing an adequate record to support his claim of error. (See *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 453; *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 798, fn. 4.)

Code of Civil Procedure section 1094.5 states "[a]ll or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court." (Code Civ. Proc., § 1094.5, subd. (a).)

The City argues because Smith was challenging the sufficiency of the City's findings and because his claim must be reviewed on a substantial evidence basis, Smith was required to provide the entire administrative record to the court. In support of this position, the City cites *Hothem v. City and County of San Francisco* (1986) 186 Cal.App.3d 702. In *Hothem*, the petitioner challenged the

city's characterization his building was a residential hotel. The petitioner placed in evidence before the court only three of his own declarations supporting his position and failed to produce any other part of the administrative record. The *Hothem* court first noted the parties agreed that it was required to "review the *entire administrative record* to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law. . . . " (*Id.* at p. 704.) The court rejected the petitioner's argument he was only required to provide an "adequate record," explaining: "since the superior court, as noted, is required to determine whether the administrative findings and decision 'are supported by substantial evidence in the light of the *whole record*, (our italics), an *adequate* record necessarily embraces the *whole record.*' " (*Id.* at p. 705, emphasis in original.)

Here, Smith neither provided the entire record nor an adequate record. He never requested the City clerk to prepare the administrative record and the documents he provided were clearly inadequate because they consisted of not only uncertified documents but documents which were not presented at the administrative hearing.[4] The

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[4] Smith contends the court erred in failing to grant him a continuance so he could file the complete administrative record with the court. Whether to grant a continuance was in the discretion of the court. (See *American Continental Ins. Co. v.C & Z Timber Co.* (1987) 195 Cal. App. 3d 1271, 1280; *In re Marriage of Johnson* (1982) 134 Cal. App. 3d 148, 154.) We find no abuse of discretion. Smith did not seek a continuance to obtain the complete record until the day of the hearing even though he had earlier notice the City was opposing the petition on the ground Smith had failed to obtain the administrative record.

court, however, had before it much of the pertinent administrative hearing because the City lodged certified copies of part of the administrative record. The fact this record was provided by the City rather than Smith does not support rejecting Smith's claims in their entirety. Smith's principle claim – that he was entitled to retain the alley portion of the lots without violating the Subdivision Map Act – involves primarily a question of law based on undisputed facts. The record provided by the City was sufficient to for a review of this claim. (See *Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657, 660.) Others of Smith's claims, however, are impacted by his failure to provide the complete record both below and here on appeal as we point out in our subsequent discussion.

II

Standard of Review

Smith contends the court erred in applying a substantial evidence test when reviewing the City's determination Smith had violated the Subdivision Map Act. Smith contends the court should have exercised its independent judgment in reviewing the record.

Code of Civil Procedure section 1094.5, subdivision (c) provides:

> "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse

> of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

The trial court is required to exercise its independent judgment when the decision substantially affects a fundamental vested right. (*Patterson v. Central Coast Regional Com.* (1976) 58 Cal. App. 3d 833, 840.)

Smith contends the Court should have applied the independent judgment test because he "had a 'statutory fundamental vested right' to convey lots H, I, J and U as the government had approved them on the Final Subdivision Map[s]" of 1910 to 1913. As we point out in our discussion of the Subdivision Map Act in part III, Smith here did not convey the lots as they existed in the original subdivision; he created new lots by retaining the street and alley portions of the lots. Even granting Smith's premise, this case does not involve a fundamental vested right. We conclude the lower court applied the correct standard of review.[5]

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[5] We note even if we were to conclude the court should have exercised its independent judgment when reviewing the administrative record, we would not reverse. The critical evidence on the key issue in this case was not disputed, i.e. what actions Smith took in selling lots H, I, J and U and the City's response. The court's decision rested on an interpretation of the law, rather than weighing and resolving conflicting facts. Had the court applied an independent judgment test, the result would have been the same.

III.

Subdivision Map Act

The objective of the Subdivision Map Act is "to regulate and control the design and improvement of subdivisions." (*Pratt v. Adams* (1964) 229 Cal. App. 2d 602, 606.) "Subdivision" is defined as:

> "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future except for leases of agricultural land for agricultural purposes. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement or railroad rights-of-way. . . . " (Gov. Code § 66424.)[6]

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[6] Smith spend much of his brief arguing he did not illegally subdivide the lots based on his interpretation of the county assessment roll which he asserts shows the lots without the adjacent streets. First, we note there is no indication this assessment roll was before the City during the administrative hearings nor any showing why it could not have been presented to the City during the hearings and therefore is not part of the record on review. Second, the assessment roll is not necessarily determinative. As one authority has explained: "The phrase 'latest equalized county assessment roll, was included in the Subdivision Map Act's definition of 'subdivision, (Govt C § 66424) to provide a convenient method of identifying the property being divided and its ownership during a given period of time. [Citation.] It is often misunderstood as permitting the owner to convey assessor's parcels without first obtaining a subdivision map. The assessor's parcel designations have no effect on application of the Map Act, however, and owners may not divide land along the lines of the assessor's parcels for the

Under the Act, before an owner may legally subdivide property for the purpose of sale, lease or financing, he generally must obtain approval of either a subdivision or parcel map.[7] (See Gov. Code §§ 66426, 66428.) Certain lot line adjustments, however, do not require filing a parcel or subdivision map. Government Code section 66412, which governs exceptions to the map requirements, in pertinent part, provides:

> "This division [i.e., the Subdivision Map Act] shall be inapplicable to:
>
> "....
>
> "(d) A lot line adjustment between two or more existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created, provided the lot line adjustment is approved by the local agency, or advisory agency. A local agency or advisory agency shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to local zoning and building ordinances. An advisory agency or local agency

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purpose of sale, lease, or financing without obtaining a subdivision map. The function and purpose of the assessor is to raise revenue and not to regulate the division of land. [Citations.]" (Cal. Subdivision Map Act Practice (Cont.Ed.Bar 1987) § 2.6, p. 24.) Finally, we note the assessor's roll shows the same streets and alleys as contained in the original subdivision maps and thus, under the Civil Code presumptions, the adjacent lots include half the adjoining streets and alleys

[7] A subdivision map is required if the subdivision creates more than five new units; a parcel map if less than five units are created.

> shall not impose conditions or exactions on its approval of a lot line adjustment except to conform to local zoning and building ordinances, to require the prepayment of real property taxes prior to the approval of the lot line adjustment, or to facilitate the relocation of existing utilities, infrastructure, or easements. No tentative map, parcel map, or final map shall be required as a condition to the approval of a lot line adjustment. The lot line adjustment shall be reflected in a deed, which shall be recorded. No record of survey shall be required for a lot line adjustment unless required by Section 8762 of the Business and Professions Code."

The City has adopted an ordinance addressing lot line adjustments which provides:

> "Notwithstanding any other provisions of this Title to the contrary, every person desiring to adjust a legal lot line between two or more adjacent lots, where the land taken from one lot is added to an adjacent lot, without creating a greater number of lots, shall comply with the procedures set forth in this Chapter for obtaining a parcel map for lot line adjustment." (Del Mar City Ordinance, § 24.70.010.)

Under the Subdivision Map Act, if a local agency "has knowledge that real property has been divided in violation of the [Subdivision Map Act] or local ordinances enacted pursuant [to the Act], it shall cause to be mailed . . . a notice of intention to record a notice of violation. . . . " (Gov. Code, § 66499.36.) The local agency is required to give the property owner notice and an opportunity for a hearing. (Gov. Code, § 66499.36.) If the local

agency determines there has been a violation of the Subdivision Map Act, it is required to file a notice of violation which "when recorded, shall be deemed to be constructive notice of the violation to all successors in interest in such property." (Gov. Code, § 66499.36.)

The Subdivision Map Act prohibits transactions in violation of the Act (Gov. Code, § 66499.30) and provides that a person who violates any provision of the Act is guilty of a misdemeanor or felony (Gov. Code, § 66499.31). The Act also provides various remedies for violations of the Act or local ordinance enacted pursuant to the Act, including allowing the purchaser of a lot sold in violation to void the sale and seek damages "suffered by reason of such division of property" and permitting the local agency to seek other legal, equitable or summary remedies including an injunction to restrain any attempted or proposed subdivision or sale in violation of the Act. (Gov. Code, §§ 66499.32, 66499.33.) Further, the Act bars a local agency from issuing a permit or granting approval necessary to develop real property which has been divided in violation of the Act. (Gov. Code, § 66499.35.)

IV

The Snakewall Property Lot Lines

Smith contends he did not subdivide any land or violate the Subdivision Map Act by retaining title to the alleys adjoining lots H, I, J and U because the alleys were not part of the lots at the time he sold the lots.

Under California law, it is presumed a person owning land adjacent to a road owns the land to the center of

the road unless the contrary is shown. (Civ. Code, § 831.) This presumption " 'is highly favored in the law.' " (*Machado v. Title Guarantee and T. Co.* (1940) 15 Cal.2d 180, 183; *Pilkington v. Fausone* (1970) 11 Cal.App.3d 349, 351-352.) Civil Code section 1112 further provides that when a person transfers land adjacent to a road, it is presumed he transfers title to the center of a road unless the grant shows a different intent. Under the presumption of Civil Code section 1112, if a property owner sells a lot adjacent to a road by referring to a recorded map, the buyer generally acquires title to the centerline of the adjoining street. (*Neff v. Ernst* (1957) 48 Cal.2d 628, 635; *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1132.)

When a street in a subdivision is dedicated to the government, the public generally acquires only an easement for the right of way; an adjacent landowner who owns the fee title to the center of the street retains the fee interest but has no right to possession or occupancy of any portion of the street. (*Safwenberg v. Marquez* (1975) 50 Cal.App.3d 301, 307-308; *Baker v. Ramirez, supra,* 190 Cal.App.3d 1123, 1132.) If the government vacates or abandons the street, then ownership reverts to the fee owners, usually the adjacent landowners. (*Baker v. Ramirez, supra,* 190 Cal.App.3d 1123, 1132; *Severo v. Pacheco* (1946) 75 Cal.App.2d 30, 34; Miller & Starr, Cal. Real Estate (2d ed. 1989) § 15.80, p. 605.)

"The policy behind the law is to avoid ownership in land in strips and gores by attaching the underlying fees of streets, both active and abandoned, to the adjoining lots." (*Safwenberg v. Marquez, supra,* 50 Cal.App.3d 301, 306.)

Here, the Snakewall subdivision of 1910 to 1913 contained various streets and alleys which were dedicated to the County of San Diego. Under the Civil Code, it is presumed each lot in the Snakewall subdivision which was adjacent to a street or alley extended to the centerline of the street or alley subject to the public's easement to use the streets and alleys. Smith presented no evidence to show the original subdivider had any other intent. Thus, at the time of the original subdivision, lots H, I, J and U included half of the adjacent alley.

In 1925, the county vacated and abandoned the Snakewall streets and alleys. As a result, those portions of lots H, I, J and U which were subject to the public easement (i.e., one-half of each portion of the adjacent alley) reverted to those lots. (See, e.g., *Pilkington v. Fausone, supra,* 11 Cal.App.3d 349, 351-352.)

In the 1980's, when Smith sold lots H, I, J and U, he retained the alley portions of lots H, I, J and U. He thus subdivided the lots, creating new units of land by dividing the alley portions from the adjacent lots. These were not mere lot line adjustments, exempted from the requirement of filing a parcel or subdivision map (§ 66412, subd. (d)), because Smith did not merely adjust the lot lines among the lots creating no new parcels; he created new parcels, i.e., the alley units which he had retained when he sold the lots. (Contrast *San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748 (readjustment of lot lines of nine parcels so that all could have frontage on road).) Smith further violated the Subdivision Map Act by failing to obtain government approval for his changes in the lots lines. (§ 66412, subd. (d).)

V

Denial of Due Process

Smith contends he was denied his constitutional right to due process because he was not provided with adequate notice and opportunity to be heard on the issue of the Subdivision Map Act violations as to lots H, I, J and U.

Smith waived this claim by failing to provide the entire administrative record. Necessarily, a claim which rests on the absence or inadequacy of notice and an opportunity to be heard requires an individual to provide the entire record. Moreover, the partial record provided by the City contradicts Smith's claim.

The partial record provided by the City shows the City communicated its concern about the sales of the Snakewall lots without the adjacent streets and alleys by June 1990, several months before the City began the process resulting in the filing of the notices of violation. Smith received notice, as an adjacent lot owner, of the September 24, 1990 hearing on the certificates of compliance for Lots H, I and J. Smith attended the meeting and was specifically asked if he wanted to speak but declined to do so. Later, the City held another hearing on the certificates of compliance for Lots H, I and J to allow Smith an opportunity to be heard. Smith spoke at the meeting held in November 1988. The record also indicates Smith had notice of the hearing on the certificate of compliance for lot U since he both attended the hearing and submitted written materials.

There is no support in the record that Smith was denied notice or an opportunity to be heard on the notices of violation imposed on lots H, I, J and U.

VI

Estoppel

Smith contends the City should be estopped from recording the notices of violation against lots H, I, J and U.

"[The] doctrine of equitable estoppel has four elements: (1) The party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citation.]" (*Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884, 890.) When estoppel is sought against the government, the court must consider whether the application of the estoppel doctrine will significantly effect any important public policies and weigh any potential frustration of a public policy against the hardship suffered by the person seeking estoppel. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) (*In re Marriage of Valle* (1975) 53 Cal.App.3d 837, 840-841.) A claim of estoppel must be formally raised at the administrative level or it is barred. (*Pittsburg Unified School Dist. v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 980.)

Here, like the due process issue, Smith has failed to establish his estoppel claim by failing to present a complete administrative record; without the whole record

there can be no complete picture of the City's conduct which might support an estoppel claim. Further, Smith has failed to establish he raised the estoppel issue at any time during the administrative process. Finally, we find no merit to Smith's claim of estoppel.

On appeal, Smith argues lots H, I, J and U were lawfully created and reflected in the recorded 1910-1913 subdivision maps and therefore the government, "[having] duly approved" of the subdivision, "in essence" gave the owner of the subdivided lots a "permit" to sell the lots, a permit which "constituted a promise by the government of the County of San Diego to the owner of those lots and his successors-in-interest that the government would not prohibit him/them from selling . . . those lots as subdivided per the governmental approval." Smith contends he bought the Snakewall property in reliance upon the validity of the 1910-1913 subdivision maps[8] and suffered detriment when the City filed the notices of violation.

Smith contends that "if there ever was to be an attempt by the government to prohibit or restrict that right, then it would have to be at least for a compelling state interest since the right was fundamental and vested," no such compelling state interest exists in this case and application of estoppel against the City would further the public policy, i.e., "the rights of the citizenry

---

[8] We note this statement seems to be contradicted by evidence that at the time Smith bought the Snakewall property in 1979, the 20 lots had been merged so he did not have the right to sell, lease or finance the lots of the original 1910-1913 subdivision.

to be able to rely and depend upon promises and assurances by the government."

The underlying premise of this argument is faulty. As we have already explained, while Smith may have had a vested right to sell the lots as reflected in the 1910-1913 subdivision, that is not what he did when he sold lots H, I, J and U. When he sold those lots without the adjacent alley portion, he created different lots than those that existed in the 1910-1913 subdivision. There were no promises by the government that he could sell the new lots H, I, J and U that he created in 1988 and 1989, therefore it cannot be said he acted in reliance on a governmental promise. Estoppel does not apply in this case.

DISPOSITION

The judgment is affirmed.

/s/ Kremer
KREMER, P.J.

WE CONCUR:

/s/ Wiener
WIENER, J.

/s/ Todd
TODD, J.

ATTACH. "D"

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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

MARGARET I. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Plaintiffs, vs. JAMES E. SMITH, et al., Defendants. AND RELATED CROSS-ACTION	CASE NO. N 49451 APPLICATION FOR ORDER FOR SALE OF DWELLING

I, Gerald L. Gorman, declare as follows:

1. I am an attorney, duly licensed to practice under the laws of the State of California and am the attorney of record for Judgment Creditors Margaret L. Roulette, S.

Scott Emsley and Robin S. Emsley ("Judgment Creditors"). The following information is personally known to me, or is based on information I believe. If called upon to testify as to the veracity of the statements below, I could and would do so competently.

2. Judgment Creditors obtained a judgment against the Judgment Debtor James E. Smith ("Judgment Debtor") on August 12, 1992. Judgment Creditors obtained an amended judgment on February 22, 1993. The balance on said judgment as of the date of this application is in excess of $1,296,016.31.

3. Judgment Creditors hereby apply for an order to sell all of the Judgment Debtor's right, title and interest in the real property legally described as:

> Lot 780, together with that portion of "ORIBA ROAD" adjacent to said lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 780 is part of Assessor's Parcel No. 299-200-55-00).
>
> Lot 781, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 781 is part of Assessor's Parcel No. 299-200-55-00).
>
> Lot 782, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARBOR HEIGHTS Unit No. 6, in the

City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 782 is part of Assessor's Parcel No. 299-200-55-00).

Lot 783, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 783 is part of Assessor's Parcel No. 299-200-55-00).

Lot 784, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 783 is part of Assessor's Parcel No. 299-200-55-00).

Lot 785, together with that portion of "ORIBA ROAD" adjacent to said Lot as closed to public use, all in ARDEN HEIGHTS Unit No. 6, in the City of Del Mar, County of San Diego, State of California, According to Map thereof No. 1592, filed in the Office of the County Recorder of San Diego County. (Lot 785 is part of Assessor's Parcel No. 299-200-55-00).

Lot "S", together with the 10.00 and 15.00 foot alleys, adjoining said Lot as closed to public use, in Block 12 of ARDEN HEIGHTS Unit No. 3, in the City of Del Mar, County of San Diego, State of California, according to Map thereof No. 1285, filed in the Office of the County Recorder

of San Diego County. (Lot "S" is part of Assessor's Parcel No. 299-261-44-00).

Lot "T", in Block 37 of ARDEN HEIGHTS UNIT No. 4, in the City of Del Mar, County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of the County Recorder of San Diego County. (Lot "T" is part of Assessor's Parcel No. 299-19-23).

Lot "H", together with the 10.00 and 15.00 foot alleys, adjoining said Lot as closed to public use, in Block 12 of ARDEN HEIGHTS Unit No. 3, in the City of Del mar, County of San Diego, State of California, according to Map thereof No. 1285, filed in the Office of the County Recorder of San Diego County. (Lot "H" is part of Assessor's Parcel No. 299-261-26-00).

Lot "I", together with the 10.00 and 15.00 foot alleys, adjoining said Lot as closed to public use, in Block 12 of ARDEN HEIGHTS Unit No. 3, in the City of Del mar, County of San Diego, State of California, according to Map thereof No. 1285, filed in the Office of the County Recorder of San Diego County. (Lot "H" is part of Assessor's Parcel No. 299-261-27-00).

Lot "J", together with the 10.00 and 15.00 foot alleys, adjoining said Lot as closed to public use, in Block 12 of ARDEN HEIGHTS Unit No. 3, in the City of Del mar, County of San Diego, State of California, according to Map thereof No. 1285, filed in the Office of the County Recorder of San Diego County. (Lot "H" is part of Assessor's Parcel No. 299-261-27-00).

4. The records of the San Diego Tax Assessor indicate that no current Homeowner's Exemption or Disabled

Veteran's Exemption have been filed for Judgment Debtor's property.

5. Record title to Judgment Debtor's property is held in the name of James E. Smith.

6. I am informed and believe that none of Judgment Debtor's properties designated for levy are a homestead.

7. The records of the San Diego County Recorder indicate that neither Judgment Debtor nor any spouse of the Judgment Debtor have recorded a Homestead Declaration under Code of Civil Procedure section 704.910 *et seq.*

8. The name and address of each person having a lien or encumbrance on Judgment Debtor's property as of April 13, 1993 and the amount secured by such lien or encumbrance which is superior to Judgment Creditors' lien are as follows:

8.1 Peter Deguzman and Flora Deguzman
c/o Smith and Associates
P.O. Box 80306
San Diego, CA 92138
Amount: $1,561.34

8.2 Mel Lawson
c/o Smith and Associates
P.O. Box 80306
San Diego, CA 92138
Amount: $864.35

9. The Judgment Debtor testified on November 17, 1992 that the fair market value of his real property is as follows:

9.1	Lots 784, "A" and "B"	$2,000,000.00
9.2	Lot 780	$1,300,000.00
9.3	Lot "S" and 785	$1,000,000.00
9.4	Lot "T"	$1,000,000.00
9.5	Lot 783	$500,000.00-$650,000.00
9.6	Lot 782	$500,000.00
9.7	Lot 781	$500,000.00

Judgment Debtor provided no evidence to support the value he has placed upon the properties listed above. Plaintiffs consider Defendant's estimated values of the properties to be inflated.

WHEREFORE, JUDGMENT CREDITORS REQUEST THAT THIS COURT SET A TIME AND PLACE FOR HEARING AND ORDER THE JUDGMENT DEBTOR TO SHOW CAUSE WHY AN ORDER FOR SALE OF THE DWELLING SHOULD NOT BE MADE IN ACCORDANCE WITH THIS APPLICATION.

I declare under penalty of perjury according to the laws of the State of California that the foregoing facts are true and correct to the best of my knowledge.

Executed this 13th day of April, 1993 at San Diego, California.

/s/ Gerald L. Gorman
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Attorney for Judgment Creditors

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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

MARGARET I. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Plaintiffs, vs. JAMES E. SMITH, et al., Defendants. AND RELATED CROSS-ACTION	CASE NO. N 49451 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JUDGMENT CREDITORS' APPLICATION FOR ORDER FOR SALE OF DWELLING

I

INTRODUCTION

Judgment Creditors Margaret L. Roulette, S. Scott Emsley and Robin S. Emsley ("Plaintiffs") submit the

following memorandum of points and authorities in support of their Application for Order for Sale of Dwelling belonging to Defendant James E. Smith ("Defendant").

II

RELIEF SOUGHT BY PLAINTIFFS

Based upon the points and authorities set forth below, Plaintiffs request the following:

1. That this court enter an order permitting the Marshal to sell at Execution Sale Lots 780 through 785 inclusive since the parcels consist of one tax assessor's parcel number and since Defendant has neither occupied the house on lot 784 nor filed a homestead or other exemption for that property;

2. That this court enter an order permitting the sale of Lot "S" as set forth above;

3. That this court enter an order permitting the sale of Lot "T" as set forth above or, in the alternative, for a determination whether lot "T" is part of the Defendant's dwelling; and

4. That this court enter an order permitting the sale of Lots "H", "I" and "J" since there is no dwelling on that property.

III

FACTUAL BACKGROUND

A. The Judgment

Plaintiffs obtained a judgment against Defendant in August, 1992 for rescission of the sale of three parcels of real property. Judgment was entered in Plaintiffs' favor in the amount of $1,046,012.81. That judgment was amended February 22, 1993 an increased to $1,296,016.31.

B. Defendant's Real Property

Defendant owns several parcels of developed and undeveloped real property in San Diego county, California. This real property is located in the Del Mar area of San Diego county. Based upon the records from the County Recorder's Office and the Defendant's examination dated November 17, 1992, excerpts of which are attached to the Plaintiffs' Notice of Lodgement, the properties owned by the Defendant subject to the Plaintiffs' judgment are set forth below. For convenience of reference, the parcel maps are attached to the notice of lodgement filed herewith. The property is described as follows:

1.	Tax Assessor's Parcel 299-261-27-00 (the property which is the subject of Plaintiffs' judgment)	Lots H, I and J (unimproved property)
2.	Tax Assessor's Parcel 299-261-44-00	Lot "S" improved property)

3.	Tax Assessor's Parcel 299-200-55-00	Lots 780, 781, 782, 783, 784 and 785 (unimproved except for lot 784 upon which a "guest house" is located)
4.	Tax Assessor's Parcel 299-19-23-00	Lots "A", "B" and "T" (Lot "A" has deft's dwelling)

The house in which the Defendant resides is situated on Lot "A". Lots "B" and "T" are unimproved. Defendant testified at his judgment debtor's examination that the "guest house" on lot 784 is largely unoccupied. Properties 2, 3 and 4 above are contiguous to each other. There is a continuous wall surrounding lots 780 through 785 inclusive and Lots A, B and T.

C. The Writs of Execution

On February 26, 1993, Plaintiffs submitted instructions to the Marshall for the sale of lots 780 through 783, 785 and lots S and T. (See Exhibit "A" to Notice of Lodgement). On March 11, 1993, the Marshall recorded the Writ of Execution and Notice of Levy (See Exhibit "B" to Notice of Lodgment). On March 16, 1993, the Marshal served Defendant with the Writ of Execution, Notice of Levy and List of Exemptions (See Exhibit "C" to Notice of Lodgment). On March 24, 1993, the Marshall posted the Writ of Execution, Notice of Levy and List of Exemptions on the subject property. (See Exhibit "D" to Notice of Lodgement). Subsequently, on or about April 2, 1993, the Plaintiffs supplemented their Marshal's instructions by

adding Lot 784 (See Exhibit "E" to the Notice of Lodgment).

Subsequently, On March 25, the Marshall mailed the Notice to Creditor of Levy on a Dwelling (See Exhibit "F" to Notice of Lodgment). As set forth in the Declaration of Gerald L. Bohart dated April 13, 1993, the Marshal's Notice of Levy on a Dwelling was based upon the following observations by the Deputy Marshall posting the notice of levy: (1) all of the lots designated for levy were contiguous; (2) there was a continuous wall around the entire perimeter of parcels 2, 3 and 4 above; and (3) there were three buildings located within the walled compound.

In addition to the foregoing, on or about March 15, 1993, Plaintiffs submitted instructions to the Marshal for the sale of lots "H", "I" and "J" (See Exhibit "G" to Plaintiffs' Notice of Lodgment). These lots were originally the subject of the litigation between Plaintiffs and Defendant, the sale of which was rescinded by the original judgment (See Exhibit "H" to Plaintiffs' Notice of Lodgment). On March 24, 1993, the Marshal recorded the Writ of Execution and Notice of Levy (See Exhibit "I" to Notice of Lodgment). On March 25, 1993, the Marshal served Defendant with the Notice of Levy, the Writ of Execution and List of Exemptions (See Exhibit "J" to Notice of Lodgment). On March 31, 1993, the Marshal posted the Notice of Levy, Writ of Execution and List of Exemptions on the property (See Exhibit "K" to Notice of Lodgment). On April 2, 1993, the Marshal mailed the Notice to the Creditor of Levy on a Dwelling (See Exhibit "L" to the Notice of Lodgment). As set forth in the Declaration of Gerald L. Bohart dated April 13, 1993, the

Marshal's deputy informed Mr. Bohart that there was a dwelling on lots "H", "I" and "J". Plaintiffs' counsel was unable to convince the Marshal's deputy that such was not the case. Accordingly, Plaintiffs also bring their motion to request the court to order the Marshal to proceed with the sale on Lots "H", "I" and "J".

IV

CONTENTIONS

Plaintiffs contend that they have not attempted to execute on a dwelling of Defendant for the following reasons:

1. The properties Plaintiffs' have designated for levy are not part of Defendant's dwelling as Defendant's residence is not situated on said properties as required by Code of Civil Procedure section 704.710(a)(1).

2. The records of the San Diego County Tax Assessor indicate that Defendant has not filed either a Homeowner's Exemption, or a Disabled Veteran's Exemption for the properties upon which Plaintiffs wish to levy; and

3. The records of the San Diego County Recorder indicate that neither the Defendant nor any of the Defendant's spouses have recorded a Homestead Declaration under Code of Civil Procedure section 704.910 *et seq.*

V

ARGUMENT

A. PLAINTIFFS HAVE NOT LEVIED ON A DWELLING

Although Plaintiffs were served with a Notice to Creditor of Levy on a Dwelling by the Marshal, they submit that they have not levied on a dwelling.

1. Defendant's Residence is not Situated on the Properties to be Levied Upon.

Code of Civil Procedure section 704.710(a)(1) defines a "dwelling" as "a house together with the outbuildings and the *land upon which they are situated.*" (Emphasis Added.)

On November 17, 1992 a deposition of the Defendant was conducted by co-counsel Kristine P. Nesthus, Esq. During this depositions, Defendant was specifically asked about which lot contained his residence. (See Exhibit "M" to Notice of Lodgement). Defendant testified under oath that his residence was located on Lot "A" of map 1343 recorded in 1912. (See Exhibit "M" page 23, lines 22 through 28.)

On or about February 26, 1993 Plaintiffs delivered a Writ of Execution to the San Diego Marshal's Office. Along with the Writ of Execution, Plaintiffs also delivered written instructions requesting the Marshal to levy on Lots 780, 781, 782, 783, 785, "S", and "T." These instructions were later supplemented on or about April 2, 1993 to include Lot 784. In addition to the foregoing, on or about march 15, 1993, Plaintiffs submitted instructions to

the Marshal for the sale of Lots "H", "I" and "J" Lot "A" was not included in the lots designated for levy.

According to the records of the San Diego Tax Assessor's Office Lot "A" is contained within Assessor's Parcel Number 299-19-23. (See Exhibit "N" to the Notice of Lodgement). However, the Assessor's Parcel Number for Lots 780 through 785 is 299-200-55, (See Exhibit "O" to Notice of Lodgement) Lot "S" is 299-261-44, Lot "H" is 299-26-26 and Lots "I" and "J" is 299-26-27. (See Exhibit "P" to the Notice of Lodgement).

According to Defendant's own testimony his residence is on Lot "A." In addition, Plaintiffs did not designate Lot "A" for levy in their instructions to the Marshal. Moreover, the lots that were identified for levy are part of Assessor Parcels different from Lot "A." Based upon these facts it is clear that Plaintiffs *did not* levy upon a dwelling of the Defendant.

2. No Exemptions Have Been Filed on the Properties Designated for Levy.

On January 25, 1993 a title search was conducted on Defendant's properties identified by Assessor's Parcel Numbers 299-192-23, 299-200-55, and 299-261-44. (See Exhibit "Q" to the Notice of Lodgement). The title search revealed that no exemptions, including a Homeowner's Exemption or a Disabled Veterans' Exemption, have been filed with the San Diego County Tax Assessor's Office.

The lack of any exemptions is further evidence that the properties Plaintiffs have levied upon are not dwellings.

3. No Declaration of Homestead Has been Recorded on the Properties Designated for Levy.

The title search conducted on the Defendant's properties described above also revealed that neither Defendant, nor any of his spouses, have filed a Declaration of Homestead on the subject properties. (See Exhibit "Q" Notice of Lodgement). Just as with the lack of any exemptions, the lack of a recorded Declaration of Homestead adds credence to Plaintiffs' position that they have not levied upon a dwelling.

VI

CONCLUSION

Based upon the foregoing points and authorities Plaintiffs respectfully request that this Court grant this Application for Order for Sale of Dwelling.

DATED: 4-13-93

/s/ Gerald L. Gorman
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IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

MARGARET I. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Plaintiffs, vs. JAMES E. SMITH, et al., Defendants. AND RELATED CROSS-ACTION	CASE NO. N 49451 ORDER TO SHOW CAUSE WHY AN ORDER FOR SALE OF DWELLING SHOULD NOT ISSUE (Filed Apr. 14, 1993)

TO: THE JUDGMENT DEBTOR JAMES E. SMITH:

The Court having considered the ex parte application of the Judgment Creditors for an Order for sale of the property commonly known as 2100 Gatun Drive, Del Mar, California 92014, and 1977 Zapo Street, Del Mar, California 92014, and for good cause,

IT IS HEREBY ORDERED that Defendant and Judgment Debtor James E. Smith appear on June 1, 1993 at 2:00 p in Department M telephonic of this Court, located at 325 S. Melrose, Vista, California, to show cause, if any, why the attached ex parte application for sale of dwelling should not be granted.

IT IS FURTHER ORDERED that a copy of this Order; to Show Cause of the ex parte application; OF the Judgment Creditors and of the Notice of Hearing in the form prescribed by the California Judicial Council shall be served, personally or by mail, on the Judgment Debtor.

Copies of these documents shall also be personally served on the occupant of the dwelling or, if no occupant is present at the time service; is attempted, posted in a conspicuous place at the dwelling. Service and posting of these documents shall be accomplished at least 30 days before the date of the hearing set forth above. Opposition filed by 5-25-93. Reply by 5-28-93.

DATED: APR 14 1993

THOMAS R. MURPHY
Judge of the Superior Court

APPENDIX D

CIVIL NO. S033083

IN THE SUPREME COURT OF CALIFORNIA

JAMES E. SMITH, Plaintiff and Appellant, v. THE CITY OF DEL MAR, Defendant and Respondent.	)	S033083 D015814 (Super. Ct. No. N50142)

Appeal From the San Diego County Superior Court
Ronald S. Prager, Judge

ANSWER TO PETITION FOR REVIEW

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CIVIL NO. S033083

IN THE SUPREME COURT OF CALIFORNIA

JAMES E. SMITH, Plaintiff and Appellant, v. THE CITY OF DEL MAR, Defendant and Respondent.	)	S033083 D015814 (Super. Ct. No. N50142)

I. INTRODUCTION

Smith attempted to modify lot lines by excluding segments from lots which he was selling with the intent of adding those segments to other lots which he retained. In so doing, he violated the Subdivision Map Act since he failed to obtain prior approval for a lot line adjustment as required by Government Code section 66412, subdivision (d). Therefore, the segments which he excluded from the sales constituted new parcels requiring a map.

In reaching its decision, the Court of Appeal applied numerous longstanding precedents to properly find that Smith violated the Subdivision Map Act. Smith seeks review, notwithstanding the extensive, preexisting authority in support of the court's opinion. Smith also seeks review based on an "alleged glaring material fact misstatement" which concerns the size of his property, a totally irrelevant fact.

In addition to review, Smith requests the extraordinary relief of a "stay" to prevent a trial judge from making a ruling on a motion filed in another action, Roulette v.

Smith. That motion, pending in Superior Court, was filed by Roulette and Emsley, who are not parties to the present matter before this court. No authority is cited to support the request for stay.

There is no reason for this court's review. There is no divergence of opinion nor any important question of law requiring decision. The petition should be denied.

II. THE REQUEST FOR STAY IS UNSUPPORTED

Smith requests a stay of a post-judgment application in the trial court in another case, Roulette v. Smith, Superior Court of San Diego County, No. N 49451; appeal pending, Court of Appeal, Fourth Appellate District, Division One, No. D017058. (Smith Attachment D.) Smith cites no authority to support the unique request of preventing a trial court from making a decision in another matter.

As he has consistently done throughout this litigation, Smith ignores fundamental prerequisites for proper submission of the matter to the court. For example, Smith failed to provide an administrative record to the trial court in bringing his administrative mandamus action to hearing. (Smith Attachment C, p. 7.)

The stay issue is similarly not properly before this court. Smith, acting in pro per, has run rampant through the judicial system without establishing jurisdiction or a sound basis for the requested relief.

III. THE CLAIMED "MATERIAL FACT" IS IRRELEVANT

Smith contends that the opinion of the Court of Appeal is "prefaced from the beginning with a glaring material fact misstatement." (Petition, p. 8: 13-15.) The alleged material misstatement is the recitation that "this case involves a 20-acre property in Del Mar known as the Snakewall property."

Whether Smith's property is 20-acres, 1-acre, or 19.5-acres is both irrelevant and immaterial to the issue raised. The Subdivision Map Act does not contain an exemption or different standards based on the size of the property in question. Smith fails to show how this claimed misstatement in any way affects the decision reached by the trial and appellate courts. There is no grounds to review based on the alleged misstatement. (Cal. Rules of Court 29(a).)

IV. THE COURT OF APPEAL DID NOT MISINTERPRET STREETS AND HIGHWAYS CODE SECTION 8351

In its opinion, the Court of Appeal does not refer to or interpret Streets and Highways Code section 8351. Since that particular provision was enacted in 1980, the court did not need to apply or interpret it with respect to street vacations occurring in 1925. Smith's reliance on Streets and Highway Code section 8351 is therefore misplaced. Although there are other similar sections

predating section 8351, Smith did not raise those sections in presenting the matter to the Court of Appeal.[1]

The Court of Appeal properly relied on existing judicial authority to analyze this prefatory issue. (*Severo v. Pacheco* (1946) 75 Cal.App.2d 30 and *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123.) In *Severo v. Pacheco* (1946) 75 Cal.App.2d 30, the court analyzed the effect of street abandonment in this fashion.

> "On abandonment of an easement, title to the fee reverts to the owner of the land. On vacation of a highway, where the state owns only an easement, title likewise so reverts." *Id.* at p. 35.

Smith does not demonstrate that there is any inconsistency between this line of authority and Streets and Highway Code section 8351. Review is unnecessary.

V. CIVIL CODE SECTIONS 831 AND 1112 WERE CORRECTLY INTERPRETED AND APPLIED

Smith incorrectly contends that Civil Code sections 831 and 1112 were misinterpreted and misapplied. However, extensive precedent supports the court's application and interpretation. Indeed, Smith's argument requires ignoring this pre-existing authority.

As early as 1921, this court applied the rule behind these provisions. " . . . [T]he real boundary line of the property is not to the side line of the street but its center line." *Anderson v. Citizens Sav. and Trust Co.* (1921) 185

---

[1] Smith also did not raise Streets and Highways Code section 8351 in his Petition For Rehearing.

Cal. 386, 392. This same rule was applied in *Neff v. Ernst* (1957) 48 Cal.2d 628:

> It is the general rule that it will be presumed that where property is sold by reference to a recorded map the grantee takes to the center of the street or streets shown on the map as bounding the property, even though the streets shown therein appear to have been vacated or abandoned or the deed itself refers to the streets as having been vacated or abandoned." *Id.* at p. 635.

Smith relies on *Speer v. Blasker* (1961) 195 Cal.App.2d 155 for the proposition that Civil Code section 1112 only applies to a deed conveying property described as being bounded a street. In so doing, Smith deliberately ignores the further elucidation of the opinion in *Speer v. Blasker:*

> "Included within the rule, because the reason therefor applies, is a deed describing the property conveyed as a specifically numbered lot or block as shown upon a map which also shows such property to be bounded by a street." [Citations omitted] *Id.* at p. 159.

All of the conveyances by Smith's predecessors were made by deed subject to the foregoing rule. *Speer v. Blasker* does not stand for the proposition cited by Smith.

This case is no different from *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123. In *Baker,* the court reviewed the effect of a street vacation on a subdivision where the lots were all owned by the same party.

> Thus, when the portion of Bravo Street bisecting the lots owned by John Maddock was abandoned in 1913, Mr. Maddock became entitled to

> possess and occupy that strip. The north half of Bravo Street became part of lots 168 through 171, and the south half of Bravo Street became part of lots 172 through 175 even though the entire parcel had a common owner. [Citations omitted] *Id.* at p. 1132.

The presumptions of Civil Code sections 1112 and 831 are "highly favored in the law." *Machado v. Title Guarantee and T. Co.* (1940) 15 Cal.2d 180, 183. This presumption serves the public policy of avoiding ownership of strips and gores. *Safwenberg v. Marquez* (1975) 50 Cal.App.3d 301, 306. Since the Subdivision Map Act is a comprehensive regulation applying to any division of land, Smith's conveyances were properly found to be illegal subdivisions. (Gov. Code, § 66424.)

As in all other cases, the court looked back to the earliest point in time before it to see if the streets and alleys had been separated from the lots by prior transfer. See *Baker v. Ramirez, supra,* 190 Cal.App.3d 1123; *Jones v. Deeter* (1984) 152 Cal.App.3d 798, 803. As in *Jones v. Deeter, supra,* the court reviewed the chain of title as far back as possible. Nothing was provided by Smith to refute the general presumption.

VI. CONCLUSION

The Court of Appeal applied long-followed, well-reasoned authority in reaching its decision. Contrary to Smith's bare statement, there is no conflicting authority. The issues raised have been uniformly decided in prior decisions by this court and other appellate decisions. There are no important issues to be resolved.

The petition for review should be denied.

Dated: June 4, 1993

/s/ Mark A. Potter
Mark A. Potter
Attorney for Defendant and
Respondent, City of Del Mar

APPENDIX E

CIVIL NO. S033083

ORIGINAL

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

James E. Smith, Petitioner and Appellant, vs. The City of Del Mar, Respondent.	CIVIL NO. S033083 (4th DCA, Div. One D015814) (No.Co.Sup.Ct. N50142)

REPLY TO ANSWER TO PETITION FOR
REVIEW AND "STAY"

(Received June 11, 1993, Sup. Ct. – SF)

On Appeal From the Judgment of the Superior Court of
the State of California, San Diego County
Honorable Ronald S. Prager, Judge

James E. Smith
2100 Gatun Street
Del Mar, California 92014
Phone 619-755-7794
Propria Persona for
Petitioner/Appellant

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California Real Estate Law 2d, *Miller and Starr,* Vol. 2 (1990) §15.80, p 605 6

Ogden's Revised California Real Property Law, Arthur G. Bowman, Vol. I, Cont. Ed. of the Bar, (1975) § 15.11, p 640 6

COURT: THE SUPREME COURT, STATE OF CALIFORNIA;

CASE NAME: JAMES E. SMITH, PETITIONER VS. THE CITY OF DEL MAR, RESPONDENT;

CASE NO. S033083; Fourth DCA, Div. One D015814; NCSC N50142.

PROOF OF FILING (PRIORITY MAIL) AND SERVICE BY MAIL

I, Barbara Dennis, declare that I am over the age of eighteen years and not a party to this action; my business

address is 993-F Lomas Santa Fe Drive, Solana Beach, California 92075; that I filed and served the below named the following documents in the following manner: REPLY TO ANSWER TO PETITION FOR REVIEW AND "STAY"; AND PROOF OF FILING AND SERVICE.

By placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then sealed each envelope, and deposited each in the United States mail at Solana Beach, California 92075 on 6/9/93.

California Supreme Court
South Tower – Eighth Floor
303 Second Street
San Francisco, CA 94107
(Original and 13 copies)

Hon. T. R. Murphy
North County Superior Court
Dept. M
325 So. Melrose Dr.
Vista, CA 92083
(1 copy; Re: 6/11/93 N49451/
D017058, Oral Argument of
6/1/93 "Telephonic ruling", at p 3 herein,
concering Motion to Sell Petitioner's residence and lots

Mark A. Potter
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For Respondent City (1 copy)

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(1 copy; Re: Thelma L. Smith

Estate CV 292-252, Attachment
by Plaintiff N49451/D017058)

Clerk of the Fourth DCA
Court of Appeal Division-One
Fourth Appellant District
750 "B" St., Suite 500
San Diego, CA 92101
(1 copy)

Circuit Court of the State of Missouri
Green County Probate Division
Green Co. Courthouse
Suite 22
Don Burrell, Circuit Judge
Division 5
Springfield, MO 65802
(1 copy; Re: 6/8/93 et al.
Attachment Hearing, Thelma L. Smith
Estate CV292-252 by Plaintiffs N49451/D017058)

Gerald L. Gorman, Esq.
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450 B St., Suite 860
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For Plaintiffs/Respondents
Rowlette, et al; Case No.
D017058/N49451; (Re: 6/11/93
Oral Argu. of 6/1/93
"Telphonic Ruling", No. Co.
Sup. Ct, 1 copy)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 9, 1993 at Solana Beach, California.

/s/ Barbara Dennis
Barbara Dennis

I.

REPLY TO RESPONDENT'S INTRODUCTION

No segments of Lots H, I and J, Map No. 1285 and Lot U, Map No. 1343 were excluded from the conveyances. "Petition . . . ", MOP, Attachment C, p 3, 3rd ¶. Govt. Code § 66412(d) states:

> "(d) A lot line adjustment between two or more *existing adjacent parcels, . . . "* Emphasis added.

Govt. Code § 66412(d) is not involved in this case as lots H, I, J and U were conveyed by reference to Final Map Nos. 1285 or 1343. "Petition . . . ", MOP, p 3, 3rd ¶. Govt. Code § 66499.57 states:

> " . . . , *it shall be lawful and sufficient to describe* the lots or blocks in any deeds, conveyances, . . . a reference sufficient for the identification of the map coupled with the description." Emphasis added.

Respondent's " . . . numerous long standing precedents . . . ", and " . . . extensive, preexisting authority . . . ", ("Answer . . . ", p 1, LL 26-28), *cites nothing* because *no precedents exist*. Del Mar's theory is 'first impression', i.e. legislative; and lacks any legal precedent.

II.

THE REQUEST FOR "STAY" IS SUPPORTED

Respondent's "administrative record" nonsense, (Answer, p 2, LL 23-25), is addressed at "Petition . . . " MOP, Attachment C, pp 9-10, wherein the lower court opines:

> "The fact this record was provided by the City rather than Smith *does not support rejecting* Smith's claims in their entirety. *Smith's principle claim – that he was entitled to retain the alley portion of the lots without violating the Subdivision Map Act – involves primarily a question of law based on undisputed facts.* The record provided by the City was sufficient for a review of this claim." (Citations omitted). Emphasis added.

D017058/N49451 Plaintiffs/Respondents/Buyers of lots H, I and J, Map No. 1285, "rescission action", relies solely on the 10/30/90 Recorded "Notices of Violation of Illegal Subdivision", (i.e. the subject matter of this "Petition . . . ") under Govt. Code § 66499.32. However, next to the last paragraph of § 66499.32 states:

> "The provisions of this section *shall not apply* to the conveyance of any parcel of real property . . . identified in a *recorded final map* or parcel map *from and after the date of recording.*" Emphasis added.

"Petition . . . ", MOP, Attachment C, pp 2, fn 3, 3-6, 11 and 16-20 identify lots H, I and J, Map No. 1285 and lot U, Map No. 1343 as the subject matter of the recorded Notices of Violation of Illegal Subdivision, as well as this "Petition . . . "

In addition other moving papers of Plaintiffs/Appellants in D017058/N49451 OSC Motions not contained at "Petition . . . ", MSL, Attachment D, plead "res judicata" based on this "Petition . . . ", MOP, Attachment C.

The 6/1/93 N49451/D017058 "telephonic Ruling" is set forth at page 3 herein.

CIVIL LAW & MOTION

DATE / DATE: JUNE 1, 1993 – TUESDAY

TIME / DEPT.: 2:00 P.M. – DEPARTMENT M

JUDGE: HON. THOMAS R. MURPHY, JUDGE

---

1. N49451 ROULETTE vs SMITH

OPPO (P-OSC RE: SALE OF DWELLING) GORMAN

(P-ORDER APPLYING NON-VESTED PROPERTY) SMITH

THE COURT FINDS THAT LOTS H, I & J ARE NOT PROPERLY ORDERED SOLD PURSUANT TO THIS OSC, BUT ARE ADDRESSED IN PLAINTIFF'S MOTION, FOLLOWING. THE COURT FINDS THAT LOTS 780, 781, 782, 785, S & T DO HAVE DWELLINGS ON THEM, & AS SUCH NO ORDER OF SALE IS REQUIRED. THE COURT FINDS THAT LOTS 783 & 784 DO HAVE DWELLINGS ON THEM WITHIN THE MEANING OF 704.710(a)(1), BUT FINDS THEY ARE PROPERLY SOLD, BASED ON THE FAIR MARKET VALUES OF THE LOTS AS SET FORTH IN THE BECHT DECLARATION, LESS THE LIENS SET FORTH IN PAR. 8 OF THE APPLICATION FOR ORDER FOR SALE OF A DWELLING.

PLAINTIFF'S APPLICATION FOR ORDER APPLYING INVESTED PROPERTY INTEREST TO SATISFACTION IF MONEY JUDGMENT IS GRANTED.

DEFENDANT'S MOTION FOR COURT TO DETERMINE WHAT PORTIONS OF ADJACENT

VACATED STREETS TO BE SOLD WITH WHICH LOTS IS DENIED PER CRC 313(a).

DEFENDANT'S REQUEST FOR SANCTIONS AGAINST PLAINTIFF IS DENIED.

PLAINTIFF'S REQUEST FOR SANCTIONS IS DENIED. SUBJECTIVE BAD FAITH IS NOT ESTABLISHED, AS REQUIRED BY *LIAMMAS vs DIAZ* (1990) 218 CA 3d 1043, 1047.

III.

RELEVANCE OF "THIS CASE INVOLVES A 20 ACRE PROPERTY IN DEL MAR KNOWN AS THE SNAKEWALL PROPERTY"

Appendix C, "petition . . . ", MOP, FACTS, *first sentence reflects an Opinion prefaced from the beginning with a glaring material fact misstatement.* See "Petition . . . ", p 8, LL 5-14.

On February 22, 1993 in Case No. D011536/N38218 the lower Court rendered its decision involving the same parties as those herein; and on May 12, 1993 in Case No. S032104/D011536/N38218 This Court DENIED "Petitioner's Petition for Review"; and S032104/D011536/N38218 involves a 'temporary taking' of the "20 Acre property in Del Mar known as the Snakewall Property"; and on or before August 10, 1993 Petitioner plans to file with the Supreme Court of the United States a "Petition for a Writ of Certiorari to the Supreme Court of the State of California", in Case No. S032104/D011536/N38218. I assume this court and the lower courts have access to and are familiar with California's filed Amicus Curiae Brief in

Lucas v. South Carolina Coastal Council, (1992) ___ U.S. ___ [112 S. Ct. 2886]. Perhaps this explains this glaring material fact misstatement? A total of (29) Amicus Curiae Briefs were filed in *Lucas,* supra, (11) in Support of So. C. Coast. Council and (18) in Support of Lucas.

IV.

THE COURT OF APPEAL DID MISINTERPRET STREETS AND HIGHWAYS CODE SECTION 8351(a)

Respondent has failed to grasp the import of the Court of Appeal conclusion that:

> "As a result [of the vacation and abandonment] those portions of lots H, I, J, and U which were subject to the public easement (i.e., one-half of each portion of the adjacent alley) reverted to those lots." Petition . . . ", MOP, Attachment C, p 16.

Respondent states that the Court "did not refer to or interpret Streets and Highways Code section 8351." "Answer to Petition . . . ", p 3, LL 19-20.

Petitioner submits that the above statement by the Court clearly shows an intent on the part of the Court to interpret the effect a vacation and/or abandonment has on lots and streets/alleys. Section 8351(a) of the Streets and Highways Code is the section which states exactly what happens upon a vacation and/or abandonment. Fully briefed at Opening Brief pp 12, 15, 17 and 37.

Respondent feels that the reason § 8351 is not applicable is because it was not in existence in 1925. "Answer to Petition . . . ", p 3. The effect of an abandonment is the same today as it was in 1925. If, by way of dedication, the

County/City was given only an easement for the public use, then naturally upon abandonment all that occurs is the easement rights are returned to the *then* fee owner.

> "The vacation of Ash Street merely terminated the surface easement for highway purposes and vested surface rights in the abutting land owners. The rule has been stated as follows: The vacation or abandonment of a highway or street, results not only in the relinquishment of the public easement, but also involves a physical closing, which entitles the owners of the fee of the land to take full and complete control of it." *Safwenberg v. Marquez* (1975) 50 Cal. App. 3d 301, 308. And further;

> "Upon abandonment of a public street or highway, *title to the street* reverts to the owners of the underlying fee, which *generally results* in a reversion to the abutting property owners, one-half to the owner of each side, subject to any private easements." Emphasis added. *California Real Estate Law 2d*, Miller and Starr, Vol. 2 (1990) § 15:80 p 605.

The emphasis was added to point out that the reference 'title to the street' is merely saying 'title to the easement' which was given in the form of dedication upon the Recordation of Final Map Nos. 1285 and 1343. It is that dedication which reverts to the *then owner of the underlying fee*. In other words the fee ownership of the land beneath the street is unaffected by either a dedication or abandonment contrary to the belief of Respondent as well as the Court.

This language, however, has confused Respondent and other Courts as noted by the premier real property

law expert in California. Petitioner/Appellant heretofore briefed in his Reply Brief at p 16, LL 16-20; and Petition for Rehearing at p 16, LL 7-13; and Petition for Review and "Stay" at p 3, LL 1923 the following:

> "Under California law, contrary to the statutory rule in some other states, *title to the land* in a public road *does not* 'revert' to the abutting owners on vacation." *Arthur G. Bowman, Ogden's Revised California Real Property Law,* Vol. I, Cont. Ed. of the Bar, (1975) § 15.11, p. 640. Emphasis added.

Respondent contends that the issue of vacations and abandonments was not raised in the Petition for Rehearing. ("Answer to Petition . . . ", p 3, fn 1.) This is completely in error. At pp 15 and 16 of the "Petition for Rehearing" it can be readily seen that the issue of abandonment was thoroughly brought to the attention of the Court of Appeals.—

Respondent's cited cases in the "Answer" at p 4, are in harmony with Ogden's supra, to wit; *Severo v Pacheco* (1946) 75 Cal. App. 2d 30; and *Baker v Ramirez* (1987) 190 Cal. App. 3d 1123; and *Anderson v Citizens Sav. and Trust Co.* (1921) 185 Cal. 386; and *Neff v. Ernst* (1957) 48 Cal. 2d 628; as well as other fully cited cases in the next paragraph, infra.

Respondent states at p 5, LL 14-15: "This case is no different from *Baker v. Ramirez*", supra, then provides a cite from p 1132 at LL 18-23. The difference between this case and *Severo v. Pacheco, Baker v. Ramirez, Anderson v. Citizens, Safwenberg v. Marquez,* and *Neff v. Ernst,* all supra, as well as *Speer v. Blasker,* infra, (1961) 195 Cal. App. 2d 155, *Machado v. Title Guarantee and Trust Co.*

(1940) 15 Cal. 2d 180 and *Jones v. Deeter* (1984) 152 Cal. App. 3d 798 is:

Petitioner/Appellant expressed a 'contrary intent' concerning his fee ownership of the adjacent vacated streets/alleys in the sales documents for lots H, I and J, Map No. 1285 and lot U, Map No. 1343; as well as in the conveyance deeds for lots H, I and J, Map No. 1285; *and none of the cases, supra, contained an expression of a 'contrary intent' by the streets/alleys fee owner grantor; and/or predecessor common grantor in past chains of title.* "Petition . . . ", MOP, Attachment C, p 3, 3rd paragraph and p 17, 1st sentence, 2nd paragraph, confirm this 'contrary intent' expression.

V.

CIVIL CODE SECTIONS 831 AND 1112 EXPRESS PRESUMPTIONS *UNLESS* A CONTRARY INTENT IS SHOWN

The thrust of Respondent's arguments seems to be that the case at bar is no different from the other 831 and 1112 cases such as *Baker v. Ramirez,* supra, (1987) 190 Cal. App. 3d 1123. However, Respondent misses the point. All of the § 831 and § 1112 cases involve a question or dispute over who owns the street/alley.

In this case there is no question or dispute as to who owns the streets/alleys. There must be that dispute in order for there to be a proper fact situation in which to apply the presumptions.

In this case there has never been an 'action' wherein the presumptions could properly be applied. The reason

is because there has never been a dispute as to that ownership. The streets/alleys have always been transferred in toto up to the transfer from Petitioner to the purchasers. Petitioner, for the first time, transferred just lots individually and manifested an intention that the streets/alleys not pass as they would be presumed to do in the absence of that manifestation. It is only Petitioner's conveyances which even remotely could provide the basis for a dispute as to ownership of the street/alley portions.

As has been previously shown, the vacating of streets/alleys has nothing to do with augmentation of lot sizes.

However, subsumed beneath Respondent's hyperbole is the crux of this issue; which is whether a 'lot' as used in connection with §§ 831 and 1112 can be the subject of an illegal subdivision under the Subdivision Map Act? The Court of Appeal as well as Respondent proffers the notion that the lots as depicted on the Subdivision Map extended to the center of the adjacent streets/alleys even though not so depicted on Final Map Nos. 1285 and 1343.

The Court of Appeal opines:

> "At the time of the original subdivision, lots H, I, J, and U included half of the adjacent alley." "Petition . . . ", Attachment C, MOP, p 16.

This hypothesis is made pursuant to the Court's interpretation of §§ 831 and 1112.

The Court of Appeal feels that given the rebuttable nature of the §§ 831 and 1112 presumption, it was up to

the original subdivider to express the 'contrary intent' necessary to rebut the presumption. "Petition . . . ", Attachment C, MOP, p 16.

It must be noted that reference to a Final Subdivision Map is merely one form of describing and depicting property. Describing property by use of a metes and bounds description is another form of describing property. Each description has a direct bearing upon §§ 831 and 1112 and the expression of a 'contrary intent' necessary to rebut the presumption. Contrary to the Court of Appeal's opinion regarding where one looks to determine a 'contrary intent' the proper place to look is the sales documents and/or deeds of conveyance; not the subdivider's intent upon Recordation of Final Map Nos. 1285 and 1343.

> "With regard to what is necessary or sufficient to show the intent of the grantor not to convey his property underneath the highway to the center thereof, the minimum requirement is that to defeat the general rule or presumption, *an intention to exclude the highway area from the conveyance must clearly appear.* Some of the cases contain statements to the effect that in order to overcome the rule of construction, or of so-called presumption, here in question, express language of retention of the highway area is required." *12 Am. Jur. 2d,* Boundaries, § 41, p 582. [Numerous citations including California.] Emphasis added.

Therefore, it is the sales documents or deeds where one looks in order to find the 'contrary intent'.

However, returning to the issue of whether or not a 'lot' per §§ 831 and 1112 can be the subject of an illegal subdivision, the answer is unequivocally NO. The simple reason is that lots under an 831 or 1112 analysis are 'imaginary'. They are not real lines. The distinction between a Final Subdivision Map 'lot' and a §§ 831 and 1112 'lot' is made crystal clear in the language found in the case of *Speer v. Blasker,* supra, (1961) 195 Cal. App. 2d 155.

> "In those instances where the monument 'is a lot or block line, its actual position on the ground as *shown on the map* is controlling and there is no provision of law which directs that its position be changed to the center of an adjoining street . . . . This argument points up the significance of the rule limiting the application of § 1112 *to a deed* describing property as bounded by a street as such. That section does not contemplate the substitution of an *assumed boundary line* for one actually described. Emphasis added. *Speer v. Blasker,* supra, p 161.

The dichotomy is clear. Attempts at combining the two types of 'lots' and using them interchangeably between the Civil Code and the Subdivision Map Act has not only resulted in a "case of first impression" before this Court; but also has resulted in engendering unconscionable confusion and litigation.

VI.

CONCLUSION

For the foregoing reasons This Court should grant the requested review ***OR*** in the alternative summarily reverse the lower Court.

Respectfully submitted,

/s/ James E. Smith
James E. Smith
Propria Persona @ 1136

Dated: June 9, 1993

APPENDIX F

ORIGINAL

CIVIL NO. S033083

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith, Petitioner and Appellant, vs. The City of Del Mar, Respondent.	CIVIL NO. S033083 (4th DCA, Div. One D015814) (No.Co.Sup.Ct. N50142)

ADDENDUM TO REPLY TO ANSWER TO PETITION FOR REVIEW AND "STAY"
(Reply filed by mail 6/9/93)

(Received June 14, 1993, Sup. Ct. – SF)

On Appeal From the Judgment of the Superior Court of the State of California, San Diego County
Honorable Ronald S. Prager, Judge

James E. Smith
2100 Gatun Street
Del Mar, California 92014
Phone 619-755-7794
Propria Persona for
Petitioner/Appellant

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Kennedy v. Hayward (1980) 105 CA 3d 953 3

Speer v. Blasker (1961) 195 Cal. App. 2d 155 3

CALIFORNIA STATUTES:

Civil Code (hereinafter C.C.):

831 2,3

1112 2,3

Code of Civil Procedure (hereinafter C.C.P.):

2077(6) 3

Government Code:

66410-66499.58 (Subdivision Map act) ..... passim

66416.5 1

66420 1

66421 1

66434 1

66449 1

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OTHER:

California Attorney General Opinion (1962) Vol. 39, p 83 at 85 2

COURT: THE SUPREME COURT, STATE OF CALIFORNIA; CASE NAME: JAMES E. SMITH, PETITIONER VS. THE CITY OF DEL MAR, RESPONDENT;

CASE NO. S033083; Fourth DCA, Div. One D015814; NCSC N50142.

PROOF OF FILING (PRIORITY MAIL) AND SERVICE BY MAIL

I, Barbara Dennis, declare that I am over the age of eighteen years and not a party to this action; my business address is 993-F Lomas Santa Fe Drive, Solana Beach, California 92075; that I filed and served the below named the following documents in the following manner: ADDENDUM TO REPLY TO ANSWER TO PETITION FOR REVIEW AND "STAY"; AND PROOF OF FILING AND SERVICE.

By placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then sealed each envelope, and deposited each in the United States mail at Solana Beach, California 92075 on 6/11/93.

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Vista, CA 92083
(1 copy; Re: 6/11/93 N49451/D017058, Oral Argument of 6/1/93 "Telephonic Ruling", at p 3 herein, concerning Motion to Sell Petitioner's residence and lots

Mark A. Potter
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For Respondent City (1 copy)

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Attorneys at Law
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(1 copy; Re: Thelma L. Smith Estate CV292-252, Attachment by Plaintiff N49451/D017058)

Clerk of the Fourth DCA
Court of Appeal Division-One
Fourth Appellant District
750 "B" St., Suite 500
San Diego, CA 92101
(1 copy)

Circuit Court of the State of
Missouri
Green County Probate Division
Green Co. Courthouse
Suite 22
Don Burrell, Circuit Judge
Division 5
Springfield, MO 65802
(1 copy; Re: 6/8/93 et al.
Attachment Hearing, Thelma L.
Smith Estate CV292-252 by
Plaintiffs N49451/D017058)

Gerald L. Gorman, Esq.
Gorman and Noorigian
Attorneys at Law
450 B St., Suite 860
San Diego, CA 92101-8003
For Plaintiffs/Respondents
Rowlette, et al; Case No.
D017058/N49451; (Re: 6/11/93
Oral Argu. of 6/1/93
"Telephonic Ruling", No. Co.
Sup. Ct, 1 copy)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 11, 1993 at Solana Beach, California.

/s/ Barbara Dennis
Barbara Dennis

I

THE TRIAL COURT EXCEEDED ITS JURISDICTION WHEN IT ESTABLISHED NEW 'LOT' BOUNDARIES FOR LOTS H, I, J MAP NO. 1285 AND U MAP NO. 1343

The contents of final maps shall be governed by the provisions of the Subdivision Map Act specifically Article 2, Exclusions, beginning with § 66499.21 of the Government Code. (All sections herein are Govt. Code (i.e. Map Act) unless otherwise designated.)

The preparation of the final map delineating and depicting the boundaries of the subdivision including lots, blocks and streets is done under the direction of and within the exclusive province of the registered civil engineer. (§ 66434). Land surveying functions are under the jurisdiction of the City Engineer (§ 66416.5) which is the position created by the local agency. (§§ 66420, 66421).

§ 66449 contains the requirement that the engineer attest that the map was prepared by him or under his direction.

A trial court cannot alter or modify the maps unless the procedures set out in the Subdivision Map Act are followed. Beginning with § 66499.21, the Superior Court of the County in which the subdivision is located must observe the requirements set forth therein in order to change the boundaries as delineated on the final map.

> "The Superior Court of the County in which a subdivision is situated may cause all or any portion of the real property included within the boundaries of the subdivision . . . to be altered or vacated, in accordance with the procedures set forth in this article." (§ 66499.21)

> "A certified copy of the decree of the Superior Court . . . ordering the alteration . . . of any recorded map pursuant to this article shall be recorded in the office of the county recorder of the county in which such real property is situated . . . " (§ 66499.28).

The trial court determined that the Grantor/Petitioner had illegally subdivided a 'lot' when he sold a lot per the final map and retained ownership of the adjacent street portions. The trial court reached this conclusion through analysis of Civil Code §§ 831 and 1112 reasoning that the presumptions of those sections in effect augmented the size of the lots shown and depicted on the final map by a distance extending to the center line of the adjacent street. There are no property lines extending to the center of the adjoining street.

> "It is the opinion of this office that the word 'lot' . . . "of land" as used in both the subdivision Law and the Subdivision Map Act refer to a 'lot' of real property . . . " *California Attorney General Opinions,* (1962) Vol. 39, p 83, at 85.

This opinion coincides with the language of § 66499.21 wherein is stated: " . . . may cause all or any portion of the real property included within the boundaries of the subdivision . . . to be altered." (supra, § 66499.21).

Additionally, by not following the procedure as set out by the Subdivision Map Act beginning with § 66499.21 then the Court by altering the boundary lines of the lots, in effect has deprived Petitioner of property within the context of procedural due process. *Kennedy v. Hayward* (1980) 105 CA 3d 953.

Therefore, by finding that an illegal subdivision of a lot had been created as the result of an analysis of §§ 831 and 1112 of the Civil Code, the Trial Court had to determine that the boundary lines depicted on the final maps showing the location and dimensions of lots H, I, J, and U were 'altered' to extend to the center of the adjoining street.

The Trial Court had no jurisdiction or authority within the law to do that in the absence of complying with the provisions of Article 2, § 66499.21 et seq.

Additionally, if there is a problem with construing the descriptive part of a conveyance of real property, then § 2077 (6) of the Code of Civil Procedure (hereinafter C.C.P.) is the 'rule' for what the court must first do in that situation.

> "(6) When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appears that the parties acted with reference to the map . . . "

The transaction involved a land sales contract of certain lots within a subdivision. Those lots were delineated and depicted on a final map. The purchasers of the lots contended in conformity with the Respondent City of Del Mar herein that the boundaries of those lots were 'considered' or 'assumed' to extend to the center line of the adjacent street. *Speer v. Blasker* (1961) 195 Cal. App. 2d 155, 161; and *Anderson v. Citizens Sav. Etc.* (1921) 185 Cal. 386, 393; and *Earl v. Dutour* (1919) 181 Cal. 58, 60.

Petitioner submits that § 2077 (6) of the C.C.P. read in conjunction with the foregoing cited Subdivision Map Act sections unequivocally demonstrate that the finding

made by the lower court was in excess of its statutory authority and therefore the lower courts were without jurisdiction to rule that the boundaries of the final map were otherwise than as depicted on the final map.

Petitioner prays that the requested review be granted and that the stay formerly requested be granted particularly in light of this additional authority submitted herein.

Respectfully submitted,

/s/ James E. Smith @1415
James E. Smith
Propria Persona

Dated: June 11, 1993

APPENDIX G

CIVIL NO. S033083

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

James E. Smith, Petitioner and Appellant,	CIVIL NO. S033083 (4th DCA, Div. One D015814) (No.Co.Sup.Ct. N50142)
vs.	
The City of Del Mar, Respondent.	

ADDENDUM TO REPLY CONCERNING THE FILED JUNE 9, 1993 "DENIAL WHICH PRECEDED THIS COURT'S RECEIPT OF THE "REPLY TO ANSWER TO PETITION FOR REVIEW AND 'STAY" IN VIOLATION OF CALIFORNIA RULES OF COURT 28(d)

(Received June 16, 1993, Sup. Ct. – SF)

On Appeal From the Judgment of the Superior Court of the State of California, San Diego County Honorable Ronald S. Prager, Judge

James E. Smith
2100 Gatun Street
Del Mar, California 92014
Phone 619-755-7794
Propria Persona for
Petitioner/Appellant

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Appendix "A", pp 1-4, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRITTEN OBJECTION, (SEE 2ND PARA. OF PLAINTIFF'S NOTICE OF LODGMENT, EXHIBIT A, FILED AND SERVED ON 6/11/93) OF PROPOSED "ORDER DENYING DEFENDANT'S MOTION TO DETERMINE WHAT VACATED STREETS AND ALLEYS WOULD BE SOLD WITH WHAT LOTS . . . "

Appendix "B", pp 1-7, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRITTEN OBJECTION [SEE 2ND PARA. OF PLAINTIFF'S NOTICE OF LODGMENT, EXHIBIT A (WITH EXHIBITS STAMPED A AND B), FILED AND SERVED ON 6/11/93], OF PROPOSED "ORDER FOR SALE OF DWELLING"

COURT: THE SUPREME COURT, STATE OF CALIFORNIA;

CASE NAME: JAMES E. SMITH, PETITIONER VS. THE CITY OF DEL MAR, RESPONDENT;

CASE NO. S033083; Fourth DCA, Div. One D015814; NCSC N50142.

PROOF OF FILING (PRIORITY MAIL)
AND SERVICE BY MAIL

I, Barbara Dennis, declare that I am over the age of eighteen years and not a party to this action; my business address is 993-F Lomas Santa Fe Drive, Solana Beach, California 92075; that I filed and served the below named the following documents in the following manner: ADDENDUM TO REPLY CONCERNING THE FILED JUNE 9, 1993 "DENIAL" WHICH PRECEDED THIS COURT'S RECEIPT OF THE "REPLY TO ANSWER TO PETITION FOR REVIEW AND "STAY" IN VIOLATION OF CALIFORNIA RULES OF COURT 28(d); AND PROOF OF FILING AND SERVICE.

By placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then sealed each envelope, and deposited each in the United States mail at Solana Beach, California 92075 on 6/14/93.

California Supreme Court
South Tower – Eighth Floor
303 Second Street
San Francisco, CA 94107
(Original and 13 copies)

Hon. T. R. Murphy
North County Superior Court
Dept. M
325 So. Melrose Dr.
Vista, CA 92083
(1 copy; Re: 6/11/93 N49451/
D017058, Oral Argument of
6/1/93 "Telephonic Ruling",
concerning Motion to Sell
Petitioner's residence and lots

Mark A. Potter
Attorney at Law
5090 Shoreham Pl., Suite 101
San Diego, CA 92122-5934
For Respondent City (1 copy)

Jack A. Curtis, Esq.
Gary A. Powell, Esq.
Attorneys at Law
750 N. Jefferson
Springfield, MO 65802
(1 copy; Re: Thelma L. Smith
Estate CV 292-252, Attachment
by Plaintiff N49451/D017058)

Clerk of the Fourth DCA
Court of Appeal Division-One
Fourth Appellant District
750 "B" St., Suite 500
San Diego, CA 92101
(1 copy)

Circuit Court of the State of Missouri
Green County Probate Division
Green Co. Courthouse
Suite 22
Don Burrell, Circuit Judge
Division 5
Springfield, MO 65802
(1 copy; Re: 6/8/93 et al.
Attachment Hearing, Thelma L. Smith
Estate CV292-252 by Plaintiffs N49451/D017058)

Gerald L. Gorman, Esq.
Gorman and Noorigian
Attorneys at Law
450 B St., Suite 860
San Diego, CA 92101-8003
For Plaintiffs/Respondents
Rowlette, et al; Case No.
D017058/N49451; (Re: 6/11/93
Oral Argu. of 6/1/93
"Telephonic Ruling", No. Co.
Sup. Ct, 1 copy)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 14, 1993 at Solana Beach, California.

/s/ Barbara Dennis
Barbara Dennis

I

DATES BRIEFS WERE FILED BY PRIORITY MAIL

The proofs of service reflect the following:

1. "Petition . . . ", p iv, May 27, 1993;

2. "Answer . . . ", p 2, June 4, 1993;

3. "Reply . . . ", p v, June 9, 1993;[1]

4. "Addendum to Reply . . . ", p iv, June 11, 1993;

5. "Addendum to Reply concerning the filed June 9, 1993 Denial . . . ", p iii, June 14, 1993.

II

EVIDENCE (ADDITIONAL) SUPPORTING THE "STAY" REQUESTED

Appendix "A", pp 1-4 is by this reference incorporated here in its entirety.

Appendix "B", pp 1-7 is by this reference incorporated here in its entirety.

---

[1] Due June 21, 1993 [i.e. 6/4/93 plus 10 days, plus 5 days (re: mailed) equals Saturday, June 19, 1993, equals due Monday, 6/21/93].

III

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this court issue a written "void" of its filed June 9, 1993 DENIAL; and grant this petition for review and order the within appeal transferred to it; **or summarily reverse the lower court's opinion with appropriate instructions based on the laws of the State of California and the United States of America heretofore briefed in this case and related pending Case Nos. D017058, D017742 and D018419.** Light[n]ing has struck twice, or more; can the thunder "clap"?

Respectfully submitted,

/s/ James E. Smith
James E. Smith
Propria Persona @1405
for Petitioner

Dated: June 14, 1993

APPENDIX "A"

James E. Smith, Propria Persona
2100 Gatun Street
Del Mar, CA 92014
(619) 755-7794

For Defendant and Cross-Complainant James E. Smith

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO NORTH COUNTY JUDICIAL DISTRICT

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY Plaintiffs, v. JAMES E. SMITH; and DOES 1 through 20, inclusive, Defendants.	) CASE NO. N49451) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRITTEN OBJECTION, (SEE 2ND PARA. OF PLAINTIFF'S NOTICE OF LODGMENT, EXHIBIT A FILED AND SERVED ON 6/11/93) OF PROPOSED "ORDER DENYING DEFENDANT'S MOTION TO DETERMINE WHAT VACATED STREETS AND ALLEYS WOULD BE SOLD WITH WHAT LOTS . . . ") DATE: 6/1/93 2 P.M.; Telephonic) DATE: 6/11/93, 9:00 A.M. Oral Argument) DEPT.: M) Judge Murphy
JAMES E. SMITH, Cross-complainant, v. MARGARET L. ROULETTE, individually; MARGARET L. ROULETTE as trustee of Trust "B" under that certain Declaration of Trust dated November 29, 1971; S. SCOTT EMSLEY, individually; S. SCOTT EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; ROBIN S. EMSLEY, individually; ROBIN S. EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; CITY OF DEL MAR; CITY COUNCIL OF DEL MAR; ROES 1 through 50, inclusive. Cross-defendants.	

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IV CONC[L]USION 3-4

NO. CO. SUP. CT. OF SAN DIEGO COUNTY, CASE NO. N49451, ROULETTE, ET AL. v. SMITH

PROOF OF FILING AND SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, self-employed in the County of San Diego, State of California, in which County the within mentioned mailing occurred, and not a party to the subject matter. My business address is 993-F Lomas Santa Fe Dr., Solana Beach, CA 92075, that I filed and served the following (a true and correct copy of which is attached) by United States mail addressed as follows:

1. Proof of Service;
2. Memorandum of Points and Authorities in Support of Written Objections, [See 2nd Para. of Plaintiff's Notice of Lodgment, Exhibit A, filed and served on 6/11/93], of Proposed "Order Denying Defendants's

Motion to Determine What Vacated Streets and Alleys Would Be Sold with What Lots . . . "

Hon. Thomas R. Murphy
North County Superior Court
Dept. M
325 So. Melrose Dr.
Vista, CA 92083
(Original)

Mark A. Potter, Esq.
Attorney at Law
5090 Shoreham Place, Suite 101
San Diego, CA 92122-5934
For Respondent City
(1 copy)

Kristine P. Nesthus, Esq.
Scalone, Stipanov, Yaffa & Mebane
Attorneys at Law
7855 Ivanhoe Avenue, Suite 420
La Jolla, CA 92037
For Respondents Roulette, et al.
(1 copy)

David L. Mulliken, Esq.
Latham and Watkins
Attorneys at Law
701 "B" Street, Suite 2100
San Diego, CA 92101-8197
For Respondents Roulette, et al.
(1 copy)

Gerald L. Gorman, Esq.
Gorman and Noorigian
Attorneys at Law
450 "B" Street, Suite 860
San Diego, CA 92101-8003
For Respondents Roulette, et al.
(1 copy)

The documents were then placed in envelopes, which were sealed, and with the postage thereon fully prepaid, either deposited with the United States Postal Service or placed for collection and mailing by me on June 14, 1993, at Solana Beach, California, following ordinary business practices.

There is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 14, 1993, in Solana Beach, California

/s/ Barbara Dennis
Barbara Dennis

I

INTRODUCTION

This written objection is being filed pursuant to the 2nd paragraph of Plaintiff's "Notice of Lodgment," (See caption p 1), on 6/11/93, 0900 A.M. after oral argument of the 6/1/93 telephonic ruling.

Defendant on 6/11/93 paid a deposit to Reta Fitzpatrick, CSR for a transcription of the 6/11/93 oral argument which should be available to the court and all parties on or before 6/16/93 (i.e. the five days referenced in the "Notice of Lodgment, supra, paragraph one).

Out of respect for this court and all parties Defendant *will not* herein repeat in detail that contained in Defendant's heretofore filed Motion moving papers; and Opposition papers filed concerning Plaintiff's two motions; and S033083/D015814/N49451 CA. S. Ct. briefs heretofore copied this court and Plaintiffs; but will merely reference said papers hereinafter.

II

DEFENDANT'S POINTS AND AUTHORITIES ARE CONTAINED IN THIS COURT'S FILES

By this reference the following are incorporated herein in their entirety:

1. Defendant's "Notice of Motion and Motion to Determine as allowed by Civil Code (hereinafter C.C.) §§ 831 and 1112 . . . ," filed 4/27/93; and [please observe that at p 2 last paragraph of Defendant's Motion moving papers that by reference Defendant's Opposition Memo. of P's. and A's. and Declaration for both of Plaintiff's motions are incorporated therein by reference and the Motion is based thereon];

2. Defendant's "Reply memo. of P's. and A's . . . ," concerning supra 1., filed 5/27/93;

3. Defendant's "Petition for Review and Stay," CA. S. Ct., filed 5/27/93;

4. Defendant's "Reply to Answer to Petition . . . ," filed 6/9/93;

5. Defendant's "Addendum to Reply to Answer to Petition . . . ," filed 6/11/93.

III

THIS COURT LACKS JURISDICTION TO ALTER OR VACATE THE LOT LINES FOR THE SNAKEWALL LOTS DEPICTED ON MAP NOS. 1285, 1343 AND 1592 EXCEPT PURSUANT TO GOVT. CODE (MAP ACT) §§ 66499.21 ET SEQ.

By this reference that set forth at, supra, Argument II, No. 5 is incorporated herein in its entirety.

IV

CONCLUSION

For the reasons set forth above and as voiced to this court at oral argument on 6/11/93, 0900 A.M. per the CSR transcript referenced at, supra, I, Defendant strongly objects to the "Proposed Order's" reliance on the Motion not being meritorious pursuant to California Rules of Court 313(a).

Unless the court reverses its position the OSC Application concurrently granted, and being objected to separately by Defendant, not only exceeds this court's jurisdiction, but the order itself will be; "An illegal subdivision of property et al." for the reasons heretofore briefed by Defendant, as well as, addressed separately in the concurrently filed "written objection" papers to the proposed order on Plaintiff's Motions, herein incorporated by this reference.

Respectively submitted,

/s/ James E. Smith
James E. Smith
Propria Persona @1345

Dated: June 14, 1993

APPENDIX "B"

James E. Smith, Propria Persona
2100 Gatun Street
Del Mar, CA 92014
(619) 755-7794

For Defendant and Cross-Complainant James E. Smith

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO NORTH COUNTY JUDICIAL DISTRICT

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY Plaintiffs, v. JAMES E. SMITH; and DOES 1 through 20, inclusive, Defendants.	) CASE NO. N49451)) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRITTEN OBJECTION, [SEE 2ND PARA. OF PLAINTIFF'S

JAMES E. SMITH,

Cross-complainant,

v.

MARGARET L. ROULETTE, individually; MARGARET L. ROULETTE as trustee of Trust "B" under that certain Declaration of Trust dated November 29, 1971; S. SCOTT EMSLEY, individually; S. SCOTT EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; ROBIN S. EMSLEY, individually; ROBIN S. EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; CITY OF DEL MAR; CITY COUNCIL OF DEL MAR; ROES 1 through 50, inclusive.

Cross-defendants.

) NOTICE OF
) LODGMENT,
) EXHIBIT A
) (WITH EXHIBITS
) STAMPED A
) AND B), FILED
) AND SERVED
) ON 6/11/93] OF
) PROPOSED
) "ORDER FOR
) SALE OF
) DWELLING"
)
) DATE: 6/1/93
) 2 P.M.;
) Telephonic
) DATE: 6/11/93,
) 9:00 A.M.
) Oral
) Argument
) DEPT.: M
) Judge Murphy
)
)

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66499.21 et seq 3,4,7

66499.32.....5,7

Other:

As contained in the documents referenced infra, Argument II, Table of Authorities now part of this court's files

NO. CO. SUP. CT. OF SAN DIEGO COUNTY, CASE NO. N49451, ROULETTE, ET AL. v. SMITH

PROOF OF FILING AND SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, self-employed in the County of San Diego, State of California, in which County the within mentioned mailing occurred, and not a party to the subject matter. My business address is 993-F Lomas Santa Fe Dr., Solana Beach, CA 92075, that I filed and served the following (a true and correct copy of which is attached) by United States mail addressed as follows:

1. Proof of Service;
2. Memorandum of Points and Authorities in Support of Written Objections of Proposed "Order For Sale of Dwelling."

Hon. Thomas R. Murphy
North County Superior Court
Dept. M
325 So. Melrose Dr.
Vista, CA 92083
(Original)

Mark A. Potter, Esq.
Attorney at Law
5090 Shoreham Place, Suite 101
San Diego, CA 92122-5934
For Respondent City
(1 copy)

Kristine P. Nesthus, Esq.
Scalone, Stipanov, Yaffa & Mebane
Attorneys at Law
7855 Ivanhoe Avenue, Suite 420
La Jolla, CA 92037
For Respondents Roulette, et al.
(1 copy)

David L. Mulliken, Esq.
Latham and Watkins
Attorneys at Law
701 "B" Street, Suite 2100
San Diego, CA 92101-8197
For Respondents Roulette, et al.
(1 copy)

Gerald L. Gorman, Esq.
Gorman and Noorigian
Attorney at Law
450 "B" Street, Suite 860
San Diego, CA 92101-8003
For Respondents Roulette, et al.
(1 copy)

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Executed on June 14, 1993, in Solana Beach, California

/s/ Barbara Dennis
Barbara Dennis

I

INTRODUCTION

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Defendant on 6/11/93 paid a deposit to Reta Fitzpatrick, CSR for a transcription of the 6/11/93 oral argument which should be available to the court and all parties on or before 6/16/93 (i.e. the five days referenced in the "Notice of Lodgment, supra, paragraph one).

Out of respect for this court and all parties Defendant will not herein repeat in detail that contained in Defendant's heretofore filed Motion moving papers; and Opposition papers filed concerning plaintiff's two motions; and S033083/D015814/N49451 CA. S. Ct. briefs heretofore copied this court and Plaintiffs; but will merely reference said papers hereinafter.

II

DEFENDANT'S POINTS AND AUTHORITIES ARE CONTAINED IN THIS COURT'S FILES

By this reference the following are incorporated herein in their entirety:

1. Defendant's "Notice of Motion and Motion to Determine as allowed by Civil Code (hereinafter C.C.) §§ 831 and 1112 . . . ," filed 4/27/93; and [please observe that at p 2 last paragraph of Defendant's Motion moving papers that by reference Defendant's Opposition Memo. of P's. and A's. and Declaration for both

of Plaintiff's Motions are incorporated therein by reference and the Motion is based thereon];

2. Defendant's "Reply memo. of P's. and A's . . . ," concerning supra 1., filed 5/27/93;

3. Defendant's "Petition for Review and Stay," CA. S. Ct., filed 5/27/93;

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5. Defendant's "Addendum to Reply to Answer to Petition . . . ," filed 6/11/93.

III

THIS COURT LACKS JURISDICTION TO ALTER OR VACATE THE LOT LINES FOR THE SNAKEWALL LOTS DEPICTED ON MAP NOS. 1285, 1343 AND 1592 EXCEPT PURSUANT TO GOVT. CODE (MAP ACT) §§ 66499.21 ET SEQ.

By this reference that set forth at, supra, Argument II, No. 5 is incorporated herein in its entirety.

IV

THE CAPTION OF THE ORDER CONFLICTS WITH THE CONTENT OF THE ORDER

The application for the OSC which to date has never been changed and the proposed "Order" state; "Application for Order for Sale of Dwelling"; and "Order for Sale of Dwelling."

The proposed "Order . . . " at p 2, #2 and Ordered #2, modifies the Application and 6/1/93 telephonic ruling to reflect that no dwellings exist on lots 780, 781, 782 and 785 (Map No. 1592); and lot S, (Map No. 1285); and lot T,

(Map No. 1592); and then reference Exhibit A, which contains a legal description not depicted as said lots on Map Nos. 1285, 1343 and 1592; and portions of said legal descriptions at Exhibit A *are not owned* by Plaintiff; and portions of lot 780 *are not contained* at ExhibitA. See Final Recorded Maps at Smith Lodged Exhibits (hereinafter SLE), N-B, N-C, and N-D which are Topographically reflected at SLE JJJJJ; or Assessor's Parcel Maps reflected at Plaintiffs Lodged Exhibit (hereinafter PLE), N, O, P and V.

The proposed order at p 2, #2 and #3 and Ordered p 3, #3-5 references Exhibit B which contains a legal description not depicted as said lots on Map No. 1592. See Final Recorded Map at SLE N-D, "Topo . . . " at JJJJJ; or PLE O. In addition; p 2, #2 and #3 and p 3 Ordered, #3-5 and 7 contain attached structures (i.e. Defendant's residence) built on more than one legal lot. See lot A, Map No. 1343 and lot 783 and lot 784, Map No. 1592 at SLE N-C and N-D which are "Topo . . . " at JJJJJ.

V

THE LEGISLATIVE WISDOM OF GOVT. CODE §§ 66499.21 ET SEQ.

Supra. Argument IV vividly illustrates why the legislature passed Govt. Code §§ 66499.21 et seq. at, supra, Argument III concerning a Superior Court's lack of jurisdiction to alter or vacate lot lines on a Final Recorded Subdivision Map.

VI

THIS COURT LACKS JURISDICTION TO ORDER PROPERTY SOLD WHICH IS NOT FEE OWNED BY DEFENDANT

Supra, Argument IV vividly illustrates why the legislature passed Govt. Code §§ 66499.21 et seq. at, supra, Argument III concerning a Superior Court's lack of jurisdiction to alter or vacate lot lines on a Final Recorded Subdivision Map.

Title to a portion of the 10.00 foot alley being sold with lot S, Map No. 1285 is owned by the Binkley Family Trust who purchased lot G, Map No. 1285 from Defendant on 3/25/88. See SLE MM, NN, LLL and LLLL.

VII

THIS PROPOSED ORDER WILL ILLEGALLY SUBDIVIDE LEGALLY SUBDIVIDED PROPERTY REFLECTED ON RECORDED FINAL MAP NOS. 1285 AND 1592 AND DEL MAR'S APPROVED LOT LINE ADJUSTMENT MAP CONCERNING LOT 780, MAP NO. 1592 AND LOT G, MAP NO. 1285

Lot 780 as described at PLE A *is not* now a legally subdivided lot as described because of Del Mar's approved lot line adjustment map; and if sold as described will be an illegally subdivided lot sale, subject to rescission under Govt. Code (Map act) § 66499.32. See SLE MM, NN, LLL and LLLL.

VIII

LOT S, MAP NO. 1285 AND LOT T, MAP NO. 1343 AS DESCRIBED AT PLE A HAVE NO ACCESS TO A PUBLIC STREET (I.E. LAND LOCKED) AND IT'S ILLEGAL TO SELL LAND LOCKED PARCELS IN CALIFORNIA (AMONG OTHER PLACES).

The sale of these parcels (i.e. lots S and T as described at Exhibit A would be subject to rescission, etc, as California law (among other places) prohibits the sale of lots without access to a public street. See SLE N-B, N-C; or "Topo . . . " SLE JJJJJ; or PLE P, V or N.

IX

LOTS 780, 781, 782, 783, 784 AND 785, MAP NO. 1592 AS DESCRIBED AT PLE A AND B SELLS VACATED ORIBIA ROAD TWICE

It's illegal to duplicate sell property in California (among other places) and any such sale would be subject to rescission, etc.; and exceeds the jurisdiction of a Superior Court among others. See PLE A and B; and SLE JJJJJ.

The above is illustrated as follows:

1. Lot 780 as described would sell vacated "Oriba" (i.e. vacated Oribia Road) adjacent to its east line;

2. Lot 781 and lot 782 as described would sell the exact same vacated "Oriba" (i.e. vacated Oribia Road) adjacent on their west line as, supra, No. 1;

3. Lot 785 as described would sell vacated "Oriba" (i.e. vacated Oribia Road) adjacent to its east line;

4. Lot 783 as described would sell the exact same vacated "Oriba" (i.e. vacated Oribia Road) adjacent to its west line as, supra No. 3;

5. Lot 784 as described would sell the exact same vacated "Oriba" (i.e. vacated Oribia Road) adjacent to its west line as, supra No. 3.

X

DEFENDANT'S RESIDENCE STRUCTURES ARE BUILT ON PORTIONS OF LOT A, MAP 1343 AND LOTS 783 AND 784, MAP 1592; AND ARE STRUCTURALLY CONNECTED; AND A SEPARATE SALE OF ANY OF THESE (3) LOTS IS ILLEGAL AND LACKS JURISDICTION

SLE JJJJJ "topo . . . " visually depicts the caption of this Argument. Any individual sale of lots 783 or 784 would be voidable under the R-1, etc. zoning on the lots as it's illegal to sell portions of a residential structure which rests on multiple lot lines in an R-1 zone. See SLE E and KK. Attached structures can only be sold under R-2, R-3, Condominium or time share zoning, etc. See Govt. Code (Map Act) §§ 66410, et seq.

XI

ALL OF THE BUYERS AT THE MARSHALL'S SALE WOULD BE UNABLE TO OBTAIN A POLICY OF TITLE INSURANCE ON ANY OF THE DESCRIPTIONS AT PLE A AND B

No title company will intentionally issue a policy of title insurance if:

1. Two separate people are buying the same property; and

2. The parcel was illegally subdivided; and

3. The parcel lacks access to a public street similar to that provided to the buyers of lots G, H, I and J per SLE AAAAA; and

4. A structure in an R-1 zone is built over the lot line or lines; and

5. The Court/Seller/Defendant lacks fee title as the property is owned by others.

In addition no Superior Court has jurisdiction to order any of, Supra, 1-5. See Govt. Code §§ 66499.21 et seq. and § 66499.32. Supra, Arguments IV-X are incorporated here by this reference.

XII

CONCLUSION

For the foregoing reasons Defendant prays that this court reverse its 6/11/93 confirmation of the 6/1/93 "Telephonic Ruling" and grant Defendant's Motion and deny Plaintiff's two motions.

Respectfully submitted,

/s/ James E. Smith
James E. Smith
Propria Persona @1410

Dated: June 14, 1993

APPENDIX H

GORMAN & NOORIGIAN

ATTORNEYS AT LAW
AN ASSOCIATION INCLUDING A PROFESSIONAL CORPORATION

BANK OF AMERICA PLAZA
450 "B" STREET
SUITE 860
SAN DIEGO, CALIFORNIA 92101

GERALD L. GORMAN*
KENNETH C. NOORIGIAN+

TELEPHONE
(619) 232-2171

*A professional Law Corporation
+Also Admitted to Washington D.C.

FACSIMILE:
(619) 232-2173

June 7, 1993

California Supreme Court Clerk
South Tower – Eighth Floor
303 Second Street
San Francisco, CA 94107

Re: Amicus Curiae Letter in Opposition to Request for Stay in Petition for Review and Stay in *Smith v. City of Del Mar*
(Case No. S 033083)

Dear Sir or Madam:

In compliance with the provisions of the California Rules of Court, particularly Rules 14 and 28(e), Margaret L. Roulette, S. Scott Emsley and Robin S. Emsley

("Amicus Curiae") lodge this letter in opposition to Petition for Review and Stay filed by James E. Smith ("Petitioner") on June 1, 1993.

The Identity of Amicus Curiae

Amicus Curiae hold a judgment against Petitioner entered by the Superior Court for San Diego County. Amicus Curiae are not parties to the dispute which is the subject of the Petition for Review in case number S 033083. However, in his Petition for Review and Request for Stay Petitioner has requested this court to stay certain enforcement of judgment proceedings, not before this court, to which Amicus Curiae are parties.

Opposition to Request for Stay

Amicus Curiae oppose the stay of any proceedings involving them and Petitioner. Petitioner has failed to file an undertaking as required by law and as previously ordered by the Superior Court and the Court of Appeal for the Fourth Appellate District. Additionally, petitioner's request for stay was previously denied by the Court of Appeal. Petitioner has failed to properly exhaust his appeal in that proceeding.

Statement of Facts

Amicus Curiae recovered a judgment for rescission and damages against Petitioner in the Superior Court of San Diego, North County Judicial District, Case No. N 49451. That case is entitled *Margaret Roulette. S. Scott*

Emsley and Robin S. Emsley F. James E. Smith. The proceeding involved three parcels of real property previously sold by Petitioner to Amicus Curiae. Judgment was entered in favor of Amicus Curiae and against Petitioner on August 19, 1992. On February 23, 1993 that judgment was increased.

On August 28, 1992, Petitioner filed a motion for Automatic Stay Pending Appeal in the Superior Court in Case No. N 49451. The trial court was requested to stay execution on the judgment pending appeal without an undertaking. That Motion was denied by the Hon. William J. Howatt on September 30, 1992. A copy of the Order Denying Automatic Stay and Requiring Undertaking is attached as Exhibit A.

Petitioner has filed an appeal of the judgment with the Court of Appeal for the Fourth Appellate District, Docket number D017058. Oral argument has been waived. The parties were notified that the case was submitted on May 17, 1993.

On October 7, 1992, Petitioner filed a Petition for Writ of Supersedeas and Stay with the Fourth District Court of Appeal. Petitioner requested the Court of Appeal to stay enforcement of the judgment. The Court of Appeal denied the Petition holding that Petitioner had "an adequate remedy at law [CCP § 917.1] and that Defendant failed to make a showing of irreparable harm." A copy of the Order Denying Petition for Writ of Supersedeas is attached as Exhibit B.

At the present time, Amicus Curiae continue their efforts to enforce their judgment against Petitioner. On April 14, 1993, Amicus Curiae filed, inter alia, a motion

for the sale of certain property owned by Petitioner. On April 14, Petitioner orally requested the Superior Court Judge Thomas Murphy to stay the hearing on Amicus Curiae's motion until after August 13, 1993. Petitioner expected a decision by the Fourth District Court of Appeal by that date. The Court inquired whether Petitioner had filed an undertaking. When Petitioner informed the court he had failed to file an undertaking, the court denied his request for a continuance.

On June 1, 1993 the Superior Court granted the motions and ordered the sale of certain property owned by the Petitioner in satisfaction of the judgment. Amicus Curiae continue their efforts at collection of their judgment against petitioner.

Opposition to Request for Stay

Amicus Curiae oppose Petitioner's request for a stay of the sale of his property for the following reasons:

1. Petitioner has failed to properly follow or to exhaust the appellate procedure in the case entitled *Roulette. et al v. Smith* (San Diego Superior Court Case No. N 49451, Court of Appeal docket number D 017058). Petitioner's appeal is pending before the Fourth District Court of Appeal. An opinion has not yet been issued. However, Petitioner is attempting to use his petition for review of the matter in *Smith v. City of Del Mar* as a vehicle to stay enforcement proceedings in a separate action involving Amicus Curiae.

2. Petitioner has an adequate remedy at law under Code of Civil Procedure section 917.1. A perfected appeal

shall not stay enforcement of a judgment unless an undertaking is given. (Code Civ. Proc. § 917.1) This provision is designed to protect the prevailing party in the trial court; *i.e.*, Amicus Curiae. Two Superior Court judges and three Justices of the Court of Appeal have previously refused to stay proceedings against Petitioner without an undertaking. Petitioner has not filed an undertaking. Therefore, no stay should be granted.

Request of Amicus Curiae

Should this Court decide to entertain the Petition for Review and Stay, Amicus Curiae respectfully request:

1. That no stay of proceedings involving Petitioner and Amicus Curiae be granted.

2. That Amicus Curiae be permitted to submit a brief addressing the issue that a stay of proceedings in their action against Petitioner should not be issued in connection with the proceedings involving the Petition for Review and Stay presently before this Court.

Very respectfully submitted,

/s/ Gerald L. Gorman
Gerald L. Gorman
Attorney for Amicus Curiae

Enlosure

APPENDIX I

D015814

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

JAMES E. SMITH, Petitioner and Appellant, v. THE CITY OF DEL MAR, Respondent and Appellee.	CASE NO. D015814 (NORTH COUNTY SUPERIOR COURT CASE NO. N50142)

Appeal from the Superior Court of San Diego County
Honorable Ronald S. Prager

PETITION FOR REHEARING

James E. Smith
2100 Gatun Street
Del Mar, CA 92104
(619) 755-7794
Propria Persona

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COURT: **COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT;**

CASE NAME: **JAMES E. SMITH, PETITIONER/APPELLANT V. THE CITY OF DEL MAR, RESPONDENT/APPELLEE;**

CASE NO. **D015814/N50142.**

PROOF OF FILING (PRIORITY MAIL) AND SERVICE BY MAIL

I, Norma J. Hewitt, declare that I am over the age of eighteen years and not a party to this action; my business address is 5665 Oberlin Drive, Suite 100, San Diego, California 92121; that I filed (Priority Mail) and served the below named the following documents in the following manner: PETITION FOR REHEARING and Proof of Filing and Service by mail.

1) ____ By having copies personally served on the below listed person by KNOX ATTORNEY SERVICE.

2) ____ By leaving, during usual office hours, copies in the office the person served with the person who apparently was in charge and thereafter mailing (by first class mail, postage prepaid) copies to the person served at the place where copies were left.

3)___ By leaving copies at the dwelling house, usual place of abode or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his office or place of business, at least 18 years of age, who was informed of the general nature of the papers and thereafter mailing (via first class mail, postage prepaid) copies of the person served at the place where copies were left.

4) xx By placing a copy in a separate envelope, with postage fully prepaid, for each address named below. I then sealed each envelope and deposited each of the United States mail at Solana Beach, California 92075 on May 5, 1993.

Clerk of the 4th DCA
Court of Appeal Division One
Fourth Appellate District
750 "B" Street, Suite 500
San Diego, CA 92101
(Original plus 4 Copies, Priority Mail)

California Supreme Court
South Tower, Eighth Floor
303 Second Street
San Francisco, CA 94107
(5 Copies, Priority Mail)

Clerk of the NCSC
Superior Court North County
325 So. Melrose Drive
Vista, CA 92083
(1 Copy)

Mark A. Potter, Esq.
Attorney at Law
5090 Shoreham Place, Suite 101
San Diego, CA 92122-5934
For Respondent City of Del Mar
(1 Copy)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 5, 1993 at San Diego, California.

/s/ Norma J. Hewitt
Norma J. Hewitt

Alphabetical abbreviations hereinafter are as follows:

Appellant's 4/13/93 written submitted and voiced oral argument	OA
Assessor's Partial Number	APA
Civil Code	CC
Clerk's Transcript	CT

Judicial Notice	JN
Line	L
Lines	LL
Opinion dated 4/27/93	OP
Page	p
Pages	pp
Paragraph	¶
Petition Filed 1/28/91	PET
Reporter's Transcript	RT
Respondents Lodged Exhibits	RLE
Section	§
Sections	§§
Smith Lodged Exhibits	SLE

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CIVIL CODE

831 ..... 9, 12, 14, 17

1112 ..... 9, 12, 14, 17

EVIDENCE CODE:

600 12

OTHER:

Ogden's Revised California Real Estate Law, Vol. I, Arthur G. Bowman, Continuing Ed. of the Bar, (1975) 15, 16, 18

RULE OF COURT:

29(b)(2) 1

I.

INTRODUCTION

California Rule of Court 29(b)(2) provides for Appellant's filing of this "Petition for Rehearing".

For convenience to all parties **Attachment A to this 'Petition'** is the (21) page Opinion, filed on 4/27/93 by the 4th DCA; and a copy of the 4/28/93 mailing to Appellant, page 22, hereinafter referenced as OP p #.

For convenience to all parties **Attachment B to this 'Petition'** is the (8) page written 'Oral Argument' submitted and voiced to this Honorable Court Panel by Appellant on 4/13/93, hereinafter referenced as OA p #; and by this reference Attachment B is incorporated herein in its entirety as though fully set forth.

Appellant's (50) page limit shall be herein reduced by the (30) pages, supra, and accordingly be limited to (20) pages or less.

SLE QQQ was incorporated by reference in Smith's Declaration in Support of Judgment on the 'Petition'

under penalty of perjury. See CT 0060 and 0080, No. 73, p 21.

Op p 1, fn. 1 last eight words " . . . involve more a matter of law than fact" certainly puts this case in the proper focus. Because of this very quote Appellant feels obliged to set forth at, infra, II, more detail than one might normally feel necessary with a quote such as fn 1, supra.

II.

MATERIAL FACTS MISSTATED OR OMITTED IN OPINION

A. OP p 2

The OP p 2 "*Facts*" from "This case involves a 20-acre property . . . ", to the end of said ¶ , i.e. "lots and their location" omits and misstates many material facts.

A-1. This case involves lots H, I and J, Map No. 1285 and lot U, Map No. 1343. See Pet at CT p 0013; and pending Case Nos. D017058 and D017742 for which JN was requested on 4/13/93, (D015814 heretofore has been JN in D017058 and D017742), at OA pp 7-8, Nos. 4 and 5, **Attachment B.** Appellant's 9/3/91 Reply Memo. of P's. and A's. in Support of Motion to Vacate Judgment Signed 7/9/91, at CT 0229, where the 8/12/91 Certified Assessment Role for lots H, I, J, Map No. 1285, and U, Map No. 1343, appears on page vi identified as APN 299-192-24 (Pifer lot U), 299-261-26 (Emsley's lot H) and 299-261-27 (Roulette lots I & J). See CT 0234.

A-2. Map Nos. 1285, 1343 and 1592 contain several hundred lots of which (20) and the adjacent vacated

streets/alleys were acquired in fee by Appellant on 12/9/77. See PET at CT p 0004-05 and SLE A thru D.

A-3. There are three Final Recorded Subdivision Maps, supra 2, making "the subdivision also . . . " and "the subdivision is . . . " a misstatement as it should be "the subdivisions . . . ", (i.e. plural). See PET at CT 0004-0005 and SLE A thru D.

A-4. The Snakewell property, supra 2, was only a portion, i.e. (20) lots and adjacent vacated streets/alleys, of the total land subdivided by Map Nos. 1285, 1343 and 1592. See PET at CT 0004-0005 and SLE A thru D.

A-5. Lots H, I and J bordered vacated Serpentine Street and alleys, not alley; and lot U borders public Zapo Street and vacated Oribia Street, not street. See SLE B and C.

A-6. Map Nos. 1285, 1343 and 1592 contain the directional number measurement of each lot, street and alley thereon depicted sufficient to construct for each a metes and bounds description. See SLE B, C and D.

OP pp 3-7 misstatements and omissions also exist in the OP as follows:

B. OP p 3

B-1. "In 1925 . . . Snakewell subdivision" is misstated and should be subdivisions (i.e. plural), supra, **A-2;** and SLE BBB contains (11) pages of vacation documents concerning numerous lots presently in the City of Del Mar of which (3) pages concern the (20) Snakewall lots (i.e. pp 1, 3 and 4 of 11 pages); and the vacation document concerning lots H, I and J, Map No. 1285 may

also be found at Case No. D017058 CT I:106-07; and said document concerning lot U, Map No. 1343 also may be found at Case No. D017742 CT II:478-0482.

B-2. " . . . merged into one or two lots" is misstated as the merger merged the (20) lots and vacated streets/ alleys, supra, **A-2,** into one contiguous parcel and not lot or lots. See SLE MMM.

B-3. " . . . unmerged in 1985 and the original subdivision was reinstated" is misstated and should be subdivisions, (i.e. plural), supra **A-2.** See SLE TT.

B-4. "In 1988 . . ." that portion of the alley adjoining said lots H, I, and J . . . " is misstated and should be street/alleys. See SLE H to the PET referenced at CT 0007, No. 12 and SLE B.

B-5. "In 1989 . . . lot U . . . but excluded the adjacent street" is misstated and should be excluded vacated "Oribia Street" (U's east line) as public Zapo Street (U's west line) *was not excluded*. See SLE I to the PET referenced at CT 0007-8, No. 13, and SLE C.

B-6. "In 1990, Smith sold other lots . . . " is misstated as lots K, L and M, Map No. 1285, were sold in 1987; and lots G, N and O, Map No. 1285, were sold in 1988. See SLE VV, LLL and QQQ, No. 12, pp 7-8; and Lots K, L, M, G, N and O, Map No. 1285, also adjoin either public Zapo or public Serpentine Streets *which were not excluded*. Residences were constructed on lots K, L and M, Map No. 1285 in 1987-1988 pursuant to Respondent and California Coastal commission approval. See SLE B and JJ.

B-7. "Smith apparently contemplated . . ." is misstated as the sales escrow instructions for lots H, I, J, Map No. 1285 and U, Map No. 1343, state that Appellant's fee owned vacated alleys will be deeded with Appellant's adjoining owned in fee lots 780, S, T and A, Map Nos. 1285, 1343 and 1592. See SLE B, C, D, WW, and XX and Case No. D015962 CT I:0011-15.

C. OP pp 4 and 5

C-1. "the hearing . . . " omits that Appellant between 9/24/90 and 10/14/90 created and then mailed to Respondent and all parties on 10/14/90 his written response to the 9/24/90 continued to 10/22/90 hearing. See PET CT 0008, No. 18; and SLE M and QQQ, pp 37-42, No. 26 thru 31.

C-2. "In late September . . . " ¶ omits that Appellant as fee owner of the vacated street/alleys was given *no notice* of said intention to record said Notices of Violation. See SLE QQQ, p 47, No. 34(c), pp 56-57, No. 40, last ¶ and p 57, No. 41(a). In addition said ¶ omits that lots H, I and J, Map No. 1285, owners provided Respondent their 10/26/90 "hold harmless" letter preceding the 10/30/90 violation recordation. See SLE N and CCC.

C-3. "Before the scheduled hearing . . . " ¶ misstated by inference the date as Appellants lots H, I and J, Map No. 1285, offer to transfer was on 11/21/90 well after the 9/24/90 hearing application continued until withdrawn by Applicant Roulette, et al on 12/4/90. See SLE DDD and YYY; and Case No. D017058 SLE JJJJ.

C-4. "Smith objected . . . " ¶ omits that this objection was mailed on 10/14/90, supra C-l; and that the 11/19/90 hearing was after the 10/30/90 Violations recordation. See SLE N. In addition Appellants first knowledge of the 10/30/90 Violations recordation was on 11/27/90, well after 11/19/90, when he was served the Roulette, et al complaint in Case No. D017058. See SLE QQQ p 56, No. 40, LL 26-28 and p 57 LL 1-6.

C-5. "Smith spoke . . . " ¶ misstates that the City voted to uphold the 10/30/90 Violations. In fact to date the City Council has never voted on said Violations. The motion passed was on "strips" as inserted by Hugo, Esq. council person on prompting by Krauel, Esq., City Attorney. See SLE QQQ, No. 34(c), p 47, LL 22-28 and p 48, LL 1-22.

Also, See pending Case No. D017058, Exhibit 31, **in evidence on 5/14/92,** MS. Tusa CSR Transcript of the 11/19/90, Item #7, Council meeting, p 18, LL 5-12, wherein the following dialogue appears:

> MS. Hugo Martinez: I move that we direct staff to record a Notice of Violation of illegal subdivision regarding lots H, I, J, Block 12 of Arden Heights Unit No. 3, according to Map No. 1285, as per the staff's analysis.
>
> Mr. Krauel: Just, just to clarify, that's the strip portions. We've already filed a Notice of VI –
>
> MS. Hugo Martinez: – That's right.
>
> MS. Winterer: I second.

Discussion follows from L 13, p 18 thru L 7, p 19 and then the vote dialogue at p 19, LL 8-14 is as follows:

Mayor McMillan: All right. Then we'll call for the question. All in favor?

Council Members: Aye.

Mayor McMillan: All opposed?

(No audible response)

Mayor McMillan: It's unanimous. Thank you.

The 12/17/90 City Clerk Certified Minutes, pp 2, 4 and 7 for Respondents 11/19/90 and 12/3/90 City Council minutes after the word "strip" was removed from the title of Item #7, supra, H, I and J, Map No. 1285, question, based on Appellant's insistence, further confirms that the City Council on 11/19/90 passed a "strip" motion and *did not and has never to this date, voted to record the 10/30/90 Violation Notices.* A motion was passed which was not the question on the published agenda. See SLE BB.

Regarding lot U, Map 1343, SLE II reflects that on 2/5/91 the California Coastal Commission approved Pifer's lot U, Map No. 1343, residence which was theretofore approved by Respondents DRB on 9/26/90 and by the City Council on 11/5/90. See SLE II.

In addition the 1/22/91 staff report confirms that on 2/4/91 the council vote question was again the alley PORTION owned in fee by Appellant. See SLE V. The *City Council to this date has never voted on the Violation Notice recorded on 1/14/91 on lot U. Map No. 1343.* See SLE V, p 1, under Issue and p 6, last ¶ . For lot U, Map No. 1343, the "strip portion" motion passed did conform to the question on the published agenda, however, *no Violation Notice on the "strip portion" has been recorded to this date.*

D. OP pp 5, 6 and 7

D-1. "In December, 1990 . . . " ¶ the date is misstated as 1/12/91 and should be 1/22/91. See SLE QQQ No. 41(a), p 57, LL 11-28 and p 58, LL 1-16.

D-2. "On January 28, 1991 . . . " ¶ omits that the lot U, Map No. 1343, Violation recordation was on 1/14/91 prior to the 2/91 council hearing, on the "strip portion", supra, C-5, and prior to the 1/28/91 'Petition' filing. See SLE U.

D-3. "Smith did not attend . . . " ¶ is a misstatement *as to date the City Council has never voted to record* the lot U, Map No. 1343, Violation recordation of 1/14/91. See SLE QQQ No. 41(a), p 57, LL 11-28 and p 58, LL 1-16.

D-4. "In support of his Petition . . . Smith's motion for summary judgment . . . " ¶ is misstated as Smith's motion was for Judgment on the Writ and the City Lodged Exhibits 1 thru 36 (not 35). See CT pp 0134-0137 as well as pp 0225-0228. In addition SLE QQQ, pp 1-64 was by reference incorporated in Smith's Declaration under penalty of perjury. See CT 0060 and 0080, No. 73, p 21.

D-5. "The Judge, also rejected Smith's arguments on the merits." last sentence, OP p 7 under FACTS is misstated *unless it is preceded by*; 'assuming for purposes of argument' "the judge, also . . . " See RT 105:5.

Judge Prager was a Del Mar resident for many years prior to 12/89 and his residence was on lot G, Map 1343, (i.e. 1986 Zapo Street), directly west across Zapo Street from lot J, Map 1285 and lot U, Map 1343 and within 300 feet of lots H and I, Map 1285, among others. See RT

2:12-26. On 7/18/91 Appellant's Declaration in Support of Motion to Vacate Judgment Signed July 9, 1991 disclosed Appellant's prior relationship with Judge Prager in detail. See CT 185 and 0189-0194.

D-6. SLE, QQQ, pp 1-64 is complete and fully disclosed the facts; and was incorporated by reference in Smith's Declaration in Support of Judgment on the Petition, **under penalty of perjury;** and is further evidence of material facts omitted or misstated in the OP. See CT 0060 and 0080, No. 73, p. 21.

III.

THE FINAL RECORDED MAP NOS. 1285, 1343 AND 1592, (20) SNAKEWALL LOTS AND ADJOINING VACATED STREETS/ALLEYS, (I.E. SNAKEWALL PROPERTY), *LOT LINES HAVE NEVER CHANGED*

The Op p 15 sets out the presumptions of C.C. §§ 831 and 1112. However, the Court fails to grasp that the presumptions are only logically applicable to the fact situation wherein the owner/grantor/seller sells the parcel/lot adjacent to the street with the intention of selling only the parcel/lot as it is depicted on the Recorded Final Map or as shown on the Assessor's Assessment Role.

In other words one must begin with a factual situation whereby the owner owns the fee in both the lot and the street. He transfers the lot with the intention of retaining his fee ownership in the street area. If that intention is not manifested in the deed/sales escrow instructions, the new owner of the parcel/lot can go to Court and pursue a quiet title action with regard to the fee in one-half the adjacent street/alley(s).

Since the parcel/lot is adjacent to a roadway (CC § 831); and since the property was transferred (CC § 1112); the new owner of the parcel/lot is entitled to the benefit of those two presumptions. It is then up to the grantor/seller to show, in a quiet title action, that a **contrary intent** with regard to the new owner taking title in fee to one-half of the adjacent roadway.

If, after examination of the deed/sales escrow instructions, the Court concludes that the grantor's intention was not sufficiently manifested in the deed/sales escrow instructions then the new owners will take fee title in the adjacent roadway because the grantor failed to rebut the presumption at the quiet title action.

It is only in Court in a dispute over ownership of the adjacent roadway wherein the presumptions have any viability or applicability at all.

If the owner/grantor/seller deeded to the new owner not only the lot but also deeded his fee interest in the street/alley(s), then from a purely logical approach the initial question would be; why do we need to presume a person owns the property when in fact he was just deeded the property? We do not need to **presume** it at all.

We only presume the new owner takes fee title in the adjacent roadway when the owner/grantor/seller makes no mention in the deed/sales escrow instructions about transferring the street/alley(s).

If the owner/grantor/seller transferred both the lot and the street to the new owner, then contending that the new owner is presumed to own the street/alley(s) is the

equivalent of going to the mortuary and seeing the deceased in the casket then declaring to the insurance company the deceased is presumed dead. The presumption is only necessary when the person or the body of the person cannot be found. You do not need the presumption of death when the deceased is in front of you. In other words, there must be a discrepancy or a dispute in order for there to be an appropriate forum for the application of a presumption.

So it is with the transfer of a lot next to a street/alley(s) where the grantor owns both the lot and the street/alley(s). If the street/alley(s) are specifically transferred with the lot then what point is there in applying the presumption. It would be comical for the new owner to commence an action whereby, as the owner of a lot adjacent to the street, he contended that he was presumed to own the adjacent one-half of the street; and then showed the court his deed declaring that the street area was in fact transferred to him. Surely the Court would respond that since there is no dispute then why are you here?

This is precisely what happened in Appellant's case prior to his 1987, 1988 and 1989 selling of lots H, I and J, Map No. 1285 and lot U, Map No. 1343, among others. Up to 1987 the Snakewall Property, which comprises not only lots H, I, J and U but (16) other lots, along with the adjacent vacated streets/alleys, was always transferred to the subsequent purchaser in toto. That is, the lots together with the streets/alleys were sold to Appellant. See Respondents Opposition Brief, p 20, L 23 and SLE A. To then turn around and say that Appellant as the owner is presumed to own that which he was just deeded is

comical. This is why prior to the 1987, 1988 and 1989 transfers of lots H, I, J, and U, among others, it is inappropriate to apply the presumptions of CC §§ 831 and 1112. If they are applicable at all it must both logically and legally be applied only to the 1987-88-89 transfers of lots H, I, J, and U, among others; because this is the only time in the chain of title of the Snakewall Property that the lots were sold without the streets/alleys and therefore the only possible time there could have **potentially** been a dispute over ownership of the adjacent streets/alleys. Presumptions are applied only in actions where there is a dispute over the subject matter which the particular presumption addresses. Evidence Code § 600.

The Court properly and correctly opines:

> "Under the presumption of Civil Code section 1112, if a property owner sells a lot adjacent to a roadway by referring to a recorded map, the buyer generally acquires title to the centerline of the adjoining street." OP p 15.

However, as both cases cited by the Court in support thereof show, the property owner selling the parcel/lot owns both the adjacent roadway and the parcel/lot and he intends to sell only the parcel/lot. If the property owner in both of those cases, *Neff v. Ernst*, and *Baker v. Ramirez*, had specifically deeded both the lot and the adjacent roadway, **or expressed a contrary intent,** there would have never been a dispute and hence no case. This agrees with the earlier contention of Appellant that there must first be a dispute in order for there to be a forum wherein the presumptions can be applied. Absent that there is no occasion to apply them.

The heart of the Court's misunderstanding of the workings of presumptions can be found in the following excerpt from the OP p 16.

> "Here, the Snakewall subdivision of 1910 to 1913 contained various streets and alleys which were dedicated to the County of San Diego. Under the Civil Code, it is presumed each lot in the Snakewall subdivision which was adjacent to a street or alley extended to the centerline of the street or alley subject to the public's easement to use the streets and alleys. Smith presented no evidence to show the original subdivider had any other intent. Thus, at the time of the original subdivision, lots H, I, J, and U included half of the adjacent alley." OP p 16.

The following time analysis will help illustrate and amplify the point:

1910-1913	Final Map Nos. 1285, 1343 and 1592 Recorded and the streets/alleys thereon depicted were dedicated to the County of San Diego, (See SLE B, C and D);
1925	County vacates and abandons various streets/alleys of which some are adjacent to the (20) Snakewall lots, (See SLE BBB);
12/9/77	Appellant purchases the (20) Snakewall lots and the adjacent vacated streets/ alleys in toto as depicted on Map Nos. 1285, 1343 and 1592, (See SLE A);
1987	Appellant sells lots K, L and M, Map No. 1285, (See SLE QQQ No. 12, pp 7-8);
1988	Appellant sells lots G, N and O, Map No. 1285 on 3/18/88 and 3/25/88;

1988	Appellant sells lots H, I and J, Map No. 1285 on 4/15/88 and 6/14/88, (See SLE G and H);
10/13/89	Appellant sells lot U, Map 1343, (See SLE I);
11/27/90	N49451/D017058 Complaint served on Appellant, (Roulette, et al, lots H, I and J, Map No. 1285);
1/28/91	N50142/D015814 Petition for Writ of Mandate, lots H, I and J, Map No. 1285 and lot U, Map No. 1343 filed (i.e. this case).
5/8/91	N51351/D017742 Complaint served on Appellant, (Pifer, lot U, Map No. 1343).

This Honorable Court opines that in 1910-13 the presumptions of CC §§ 831 and 1112 served to make the lots adjacent to the streets and alleys extend to the center of the adjoining streets and alleys. This implies that those presumptions somehow worked of their own accord to effectuate this augmentation back in 1910-13. Presumptions do not work that way. Presumptions can only be applied in an action and then the only thing they really do is serve to shift the burden of proof. The first Court action was initiated in 1990, (i.e. N49451/D017058). If the presumptions of CC §§ 831 or 1112 were to be applied at all it would have to be in that action and then only if there was a dispute as to ownership of the adjacent one-half of the street/alleys.

Furthermore, it must be remembered that in 1910-13 the developer/owner of the Snakewall Property owned the entire subdivisions in fee simple. Once the property was subdivided the only change which occurred was the

land was now depicted on the Final Subdivision Map Nos. 1285, 1343 and 1592 as subdivisions with boundaries depicting lots, streets and alleys. He still owned all of the property in fee. Therefore, what need is there to say that he is presumed to own one-half the street when in fact he (the subdivider) owns the entire land subdivided, i.e. lots and streets/alleys.

Additionally, if the lots were deemed at the time to extend to the centerline of the adjacent streets/alleys, then the question must be asked; why do the Final Maps not depict the boundaries of the adjacent lots as extending to the centerline? The answer to this is simply that the lot boundaries do not extend to that point.

As the Court has acknowledged, when the property which was designated as streets/alleys was dedicated to the County, the County only acquired an easement for public use. This means by definition that the original owner/developer kept the fee title in the streets/alleys. That is he remained the owner of the fee underlying the street. Therefore, upon abandonment or vacation of the easement, the adjacent owner gets his easement back for now the County has declared it no longer wants it.

The fee title, however, as well as the boundaries of the lots and streets is unaffected.

The Court opines at OP p 16:

> "If the government vacates or abandons the street, then ownership reverts to the fee owners, usually the adjacent land owners." OP. p 16.

The Court, **in error,** is under the assumption that the term 'ownership,' as used by the Court, refers to the title

in the land of the street as reverting to the abutting landowners. It is apparently this premise upon which the Court theorizes that the adjacent lots were augmented upon vacation of the streets.

The premise, however, is incorrect. *Ogden's*, infra, as well as the cases cited by the Court, particularly *Baker v. Ramirez*, stand for the proposition that 'ownership' refers only to the easement in the streets/alleys, not the fee title in the land of the streets/alleys. Remember, the fee title to the lots as well as the streets/alleys remained in the original owner/developer or subsequent grantees. The leading authority in California on real Property writes, **contrary** to the Court's holding:

> ". . . under California law, contrary to the statutory rule in some other states, *title to land in a public road **does not*** "revert" to the abutting owners on vacation. Perhaps the term 'reversion' is properly used in the sense that possession of the road reverts to the private use and occupancy of the fee owner on vacation; still, the term is sometimes erroneously associated with a concept of a reversion of title, and for that reason its use should be avoided." *Ogden's Revised California Real Property Law*, Vol. I, Arthur G. Bowman, Continuing Ed. of the Bar, (1975).

The first reading of cases such as *Baker v. Ramirez* would perhaps lead most readers to the conclusion that upon abandonment of the streets/alleys "ownership" of those streets/alleys revert proportionately, up to the center line, to the adjacent lots. However, a careful reading shows clearly that the 'reversion of ownership' language refers to the elements of the easement given the County/

City originally and those are the elements of possession and occupancy, *not as Ogden points out*, title to the land of the street.

Admittedly this is an easy mistake to make, however, once the concept is grasped the City's theory of illegal subdivision completely fades away.

Once the concept that upon vacation of the public road it is the easement rights of possession and occupancy which revert to the fee owner, instead of the title to the land in the public road reverting, **then and only then can it be seen that there never were portions** of lots H, 1, J, and U which were subject to the public easement contrary to the Court's view. Op p 16.

The only property which was subject to the public easement was that land designated and boundaried as streets/alleys as depicted on Final Recorded Subdivision Map Nos. 1285, 1343 and 1592.

When the vacation of those streets/alleys occurred in 1925 all that happened was the fee owner, that is the person who had title to the land adjacent to the public streets/alleys, could now possess and occupy that strip of land. Upon vacation it becomes a private street/alley as opposed to a public street/alley. As was noted in the leading case of *Anderson v. Citizens Sav. and Trust Co.* (1921) 185 Cal. 386 wherein the Supreme Court of California remarked with regard to the rules embodied with CC §§ 831 and 1112:

> "It may likewise well be that the rule would not apply to the conveyance of a lot bounded by a street where the street is described as abandoned. **The final question after all is one as to**

> **the intention of the parties**, and it would seem not unreasonable to consider such description as one of a lot bounded by what is now private property, although once a street, so that the real boundary was the line of that property." *Anderson*, supra, at 394. Emphasis added.

This shows, inter alia, that the property which was formerly a public street merely became private property upon abandonment. The easement reverted to the fee owner, but the property used as a street did not get divvied up to adjacent lots, it remained just as it was depicted and boundaried on the Final Maps.

So it was with the Snakewall Property. It remained exactly as it was originally subdivided by Map Nos. 1285, 1343 and 1592 in 1910-13 and was conveyed that way until 1987-89 when Appellant sold lots H, I, J, Map No. 1285, and U, Map No. 1343, among others, individually as opposed to selling the entire 'Snakewall Property' in toto.

IV.

CONCLUSION

In conclusion, it appears that the Court has simply misinterpreted the phraseology "ownership reverts to the fee owner". This misinterpretation is not uncommon as *Ogden's* treatise, supra, points out. However, it is a misinterpretation which, if allowed to go uncorrected, changes from left to right the meaning of and the application of CC §§ 831 and 1112 to the sales of property adjacent to public or vacated streets/alleys throughout California.

It is respectfully and most earnestly requested that this Honorable Court grant the requested rehearing in

this case so that this not uncommon, yet grave **'first impression', misinterpretation** of the law of California be corrected.

Thank you.

Respectfully submitted,

/s/ James E. Smith
James E. Smith
Propria Persona @1145

May 5, 1993

[Attachment "A" reproduced herein at pages C-17 – C-37]

[Attachment "B" reproduced herein at pages J-1 – J-20]

APPENDIX J

CERTIFIED COPY

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
FOR THE COUNTY OF SAN DIEGO

JAMES E. SMITH, Petitioner, v. CITY OF DEL MAR, Respondent.	)	Case No. D015814

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DANIEL KREMER
HOWARD WIENER AND RICHARD HUFFMAN
APPELLATE COURT JUSTICES

San Diego, California
Tuesday, April 13, 1993

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[p. 2] SAN DIEGO, CALIFORNIA - TUESDAY, APRIL 13, 1993

THE COURT: Case Number 11, Smith versus City of Del Mar.

MR. SMITH: Good morning, your Honor. I am James E. Smith, propria persona, the Appellant in D015814. Good morning, Honorable Presiding Justice and Honorable Associate Justices.

Your Honors, I have provided the clerk with four copies of my oral presentation for you and one for her, and I've just provided Mr. Potter, the Respondent, a copy.

THE COURT: Mr. Smith, we appreciate that, and like a senate or a house committee, we'll enter this in the record as if it was stated orally. So you don't have to go through and recite it all, if you'd like just to summarize and point us to the parts of this that you think are most important, because we certainly will look at it. So you don't have to read it.

MR. SMITH: Having spent a great deal of time on it, I view all of it important.

THE COURT: Fine.

MR. SMITH: So if I may present it, perhaps I can just move along really rapid, because I know you have the presentation. Is that okay with your Honor?

THE COURT: We have. Go ahead.

MR. SMITH: This case is much simpler than counselor for the City would have one believe through the briefing of the issues. The issues are simple and straightforward and involve nothing more than a horn-book approach in order to resolve them.

The issues are this: Number one, can the presumptions [p. 3] of Civil Code Section 831 and 1112 be applied to this case? And number two, can a subdivision of land occur, as that term is defined at Government Code Section 66424, when lots depicted on a final subdivision map are conveyed pursuant to lot letters which reference the map?

And finally, number three, can the express language in a deed manifesting an intent that the adjacent vacated alley or street portions not pass with the conveyance of the lot effectuate a subdivision of the theoretical larger lot extending to the center of the street?

In addressing the first issue, that is, the presumptions of Civil Code Section 831 and 1112, your Honors, those presumptions have been utilized in a way by the City of Del Mar and the trial court which the law does not allow them to be utilized.

Firstly, in order to even begin with a presumption, there has to be an action. That is what Evidence Code Section 600 requires. In other words, according to Section 600, there has to be a fact or group of facts found or

otherwise established in the action, and then from this factual setting, the judge or judges determines what presumption or assumption of fact is to be made.

Your Honors, it is only within the setting of an action, as that term is defined at Code of Civil Procedures 22, wherein a presumption can operate or have any validity. Outside of that action or legal proceeding, a presumption, from a legal standpoint, really has no meaning.

The City of Del Mar, however, doesn't view presumptions [p. 4] in that way. They believe that presumptions work on their own, as evidenced by the language used to justify the filing of the notices of violation in this case.

The staff report, as well as the minutes from the administrating meeting of September 24, 1990, show just how the City's thinking was at the time. The City stated that, following the vacating of the alleys and roads in 1925 – and I'm going to quote – "The alleys and roads were united into the adjoining properties . . . thus Lots H, I, and J were inclusive of the property delineated as alleys and road."

This language comes verbatim from the case of *Baker v. Ramirez*, which the City conveniently excised certain portions from so that it read – and I'll quote – "Thus, when the portion of Bravo Street bisecting the lots was abandoned in 1913, the north half of Bravo Street became part of Lots 163 through 171, and the south half of Bravo Street became part of Lots 172 through 175."

Your Honors, I submit that someone down at the Planning Department of Del Mar got legal advice which was not the product of a diligent briefing effort. If *Baker*

had been briefed properly, it would have been seen that *Baker* was first and foremost a quiet title action wherein the litigants in *Baker* were disputing ownership of the alley portions adjacent to the lot.

Therefore, under those facts, Civil Code Section 1112 was appropriately applied. In our case, no dispute over ownership exists, and there is no occasion to apply the presumption.

Your Honors, whenever there is a question of whether or [p. 5] not there is a potential Subdivision Map Act problem, and more specifically, whether there has been a subdivision of the land at all, one must first look to Section 66424 of the Map Act, Government Code, to examine the definition of "subdivision."

If the particular conduct being examined does not come within the ambit of the definition of "subdivision," then this Court recently said, in *San Dieguito Partnership v. City of San Diego,* Even potential Map Act problems are eliminated. In other words, if the land is sold as a unit, which is reflected on the assessor's roll, then by law there can be no subdivision. A subdivision occurs only when you break up that unit.

Your Honors, the land transferred to the grantees herein was the unit or units as reflected on the assessor's roll and as they were depicted on the map. The City's contention that there was an illegal subdivision is premised exclusively upon the theory that the vacating of a public street in conjunction with the presumptions of Civil Code Section 831 and 1112 somehow results in the augmentation of the lots or units adjacent to the street by a distance of one half of the street. In other words, the

lots automatically grew in size by a distance of one half of the street to the center of the adjoining street.

This is absurd. Appellant's brief amply shows that the vacating of the street and alley merely terminates the public easement and returns it to the fee owner, being the Appellant in this case. That's precisely, precisely what Section 8351 of the Streets and Highways Code says happens. That is what all of the cases say happens. Nothing else.

The presumptions of Civil Code Section 831 and 1112 [p. 6] have nothing to do with the vacating of streets and alleys. The City, however, read the case of *Baker v. Ramirez* and decided that it sounded like a good fact situation upon which to base their contention that the lots and streets were united. But obviously, that was all they did. They didn't do their homework.

If they had done their homework, they would have read the case of *Earl v. Dutour* cited in *Baker* and would have realized that the lot referenced in – referred to in *Baker* is tied exclusively to possession and occupancy. It has nothing to do with fee title.

Furthermore, if the City had read the case of *Speer v. Blasker,* then they would have seen that those 831 and 1112 lot lines are imaginary and that the 831 and 1112 lot is an entirely different creature from a Subdivision Map Act lot, primarily because an 831 or 1112 lot can only come into being following a quiet title action, not before. But the City did not do their homework, and that's why we're here.

Now, the City has on several occasions opined that I, as grantor, could exercise my right to retain ownership of the streets and alleys. It's just that according to the City, the right conflicts or overlaps with the requirements of the Subdivision Map Act. Nothing could be more incorrect.

Section 831 has nothing to do with a right to retain ownership of a street and alley portion; 831 and 1112 are presumption statutes. The reference to a contrary intent in those statutes merely directs a court as to what type of evidence will rebut the presumption. My right to retain ownership of the alleys or streets comes to be my virtue of my fee title ownership [p. 7] of the property. That's all.

Unless there is a subdivision of property, the Map Act is not even considered. The City is trying to say that the presumption of Civil Code Sections 831 and 1112 worked on their own back in 1925 to make a larger piece of property so that, by exercising my right to retain ownership of the alley, I therefore subdivided a hypothetically larger lot.

I will hand it to the City and say that the theory is indeed creative. In fact, it is so creative that this is the first time in the legal history of this State that the theory has been proffered.

Each and every case in the annotations to both Civil Code 831 and 1112 are quiet title actions. This is because before a judge can apply the presumptions of 831 and 1112 to a particular fact situation, that fact situation has to involve a dispute over ownership of the adjacent street portion. In our case, there is no dispute over what my

deeds to the grantees said about my intention with regard to retaining ownership of the alleys.

Your Honors, Sections 831 and 1112 of the Civil Code have nothing to do with the fact of this case. Furthermore, they can only be applied by a judge in an action involving a dispute over ownership of the street or alley adjacent to the lot. And even if there had been a quiet title action – even if there had been a quiet title action filed, the City has acknowledged on numerous prior occasions in court that the grantees would lose that quiet title action because the language in the deeds and/or escrow sales instructions more than adequately rebut the [p. 8] presumption of ownership to the center of the adjoining alley or street.

In this case, however, there has never been a dispute nor has there been an action where the presumptions could be applied and Appellant afforded an opportunity to rebut those presumptions. Therefore, the City's premise for declaring that my retention of ownership of the streets and alleys constituted an illegal subdivision turns out to be no premise at all.

As far as the issue of having the record prepared for the hearing, I can say only that, at the time, my attorney, Hillyer and Irwin here in San Diego, determined that there was no record to get from the City, as there was no hearing held prior to the filing of the notice of violation on October 30, 1990. Remember, the September 24 hearing has been briefed, but it was continued four times until early December, every 30 days. I went to City Hall each time, and then the applicant withdrew the application.

In fact, your Honors, I submit that all any court really needed to resolve this case was to see my deeds to the grantees evidencing an intention that the alleys not pass with the conveyance of the lots. And if that wasn't enough, surely any court with a working-hand knowledge of presumptions would know that the presumptions of Civil Code Section 831 and 1112 are rebuttable and that there are at least – there at least has to be a hearing wherein the grantor is afforded an opportunity to rebut those presumptions and that the Planning Department for the City of Del Mar and any other city is no place for that hearing to be held. The Code says it can only be in an action where y [p. 9] presumptions are applied. And furthermore, actions are only held by courts of law.

And lastly, Section 1094.5 of the Code of Civil Procedure says that the record may be supplied by the Respondent, which it was, even though the mountain of documentation submitted by the City, as it customarily does, was entirely unnecessary.

THE COURT: Mr. Smith, you adlibbed a little, so you used up your time. I know you've just got some requests for a judicial notice, which you can leave to the right in here and reserve some time for questions and response.

MR. SMITH: I do have items listed I'm requesting judicial notice on by reference. I would ask the Court to judicially notice those items. And with that is that permissible? With that, I'll close and reserve time for rebuttal or question. Thank you, your Honor.

MR. POTTER: Good morning, your Honors. Mark Potter for the City of Del Mar and City Council of Del Mar.

Very briefly, three items. First of all, the suggestion was made today and also in the reply brief that Civil Code Sections 831 and 1112 can only apply in a quiet title action. I think some research shows that that's, in fact, incorrect. At least three cases that I'm aware of have applied those sections in other contexts.

Jones v. Deeter, a 1984 decision, 152 Cal. App. 3d 798 applied it in a personal injury action to determine liability with respect to an accident down a center median strip. In *Porter v. City of Los Angeles*, a 1920 decision, 182 Cal. 515, it was applied in the trespass action. And finally, in *Taylor v.* [p. 10] *Continental Southern Corp.*, a 1951 case, found at 104 Cal. App. 2d 425, it was applied in an accounting action with respect to an oil and gas leak.

Certainly those provisions aren't confined to a quiet title action. The City, sitting as in an adjudicatory fashion, was entitled to rely on those sections, which really enunciate rules of law, rules of construction with respect to transfers.

The second item, briefly, is the *Earl v. Dutour* decision –

THE COURT: Before you get to that case, in terms of a lot – just a basic understanding on my part. We have a subdivided lot we'll call 'A', and it's adjacent to a public street. Did the lot that's sold to a buyer go to the middle of the public street, subject to the public's easement, or did the lot that's sold exclude the easement? In

other words, is it retained by the seller, subject to an easement? Mechanically, how is that lot described?

MR. POTTER: My understanding is that the lot always includes to the center line, unless there has been an exclusion somewhere in the chain of title. Some of the cases, as I read them, are a little confusing because the courts, in some instances, have expressed the – at the time of the street vacation, something happening which attaches the lot and the street together. Other cases are saying, Well, it's merely an easement, and that the fee is always attached to the lot unless there has been some prior indication of separation.

THE COURT: In these lots that were sold here, when they were sold, they excluded property on the street; is that [p. 11] correct?

MR. POTTER: At the time Mr. Smith sold them, yes. He did specifically exclude the alley portion.

THE COURT: So the physical description of the lots that he sold are different than the physical description of the earlier subdivided lot?

MR. POTTER: That's certainly our position, yes.

THE COURT: But did the legal description previously include the area of the alley? My colleague is asking me, What does the legal description of those lots include?

MR. POTTER: I may have misunderstood the question. And if I did, I apologize for that. But the legal description, I think, was simply referenced to the map.

THE COURT: That's my concern here, is that I understand your position, and I go through the metaphysics of it, but if you have Subdivided Lot H in 1910, and then later on Mr. Smith sells Subdivided Lot H, whatever that legal description might be, he's selling the same piece of property that was earlier subdivided.

MR. POTTER: If he had sold Subdivided Lot H, we would agree.

THE COURT: But we thought he did.

MR. POTTER: No. He sold Subdivided Lot H, excluding the following portion, which was the adjacent alley.

THE COURT: Back to my question. Based on that exclusion, the legal description of 'H' must have been different when he sold it than as it was initially devised. In other words, what I'm saying is, if he says, I'm selling this piece, [p. 12] I'm selling 'H', except I'm retaining a part of it, how can that be the same legal description as just selling 'H'?

MR. POTTER: I'm not sure whether that's intended as a rhetorical question.

THE COURT: That's not intended as a rhetorical question. I understand the County's position, but is it a correct position?

MR. POTTER: Well, I think if you look at it as – I'm selling Lot H as one transaction and disregarding the exclusion of the road and say, I'm selling Lot H, excluding the eastern ten feet, those are obviously two different transactions. Now, what lot – and to say that Lot H and

Lot H excluding something are the same is to deny common sense.

By the same token, to say that selling Lot H and selling Lot H, excluding the alley, are the same, seems to defy common sense. If the alley were not part of the lot, then what was the purpose of referring to it in the deed and specifically excluding it from the transaction?

THE COURT: Do I interpret your comment to say that the pieces of property necessarily – that he conveyed were necessarily different from the way they were initially subdivided, assuming that's correct? I mean, I'm a little puzzled why you describe it in the abstract and don't describe it and say, He's conveying a different piece of property than the subdivided 'H'. I mean, you haven't said that, except theoretically.

THE COURT: If the lots are sold – with reference to a map, does the map show the alley in place so that it appears [p. 13] there's a boundary line if you head to the alley for Lot H?

MR. POTTER: It does show a boundary line. And I think that's why there's a legal presumption as to what – who actually owns those alleys, so that there isn't this strip of land that's floating around. It's a rule of construction that it will be deemed to be attached to the adjacent lots. And it only comes into question, really, once those alleys or streets are vacated and we get into the issue of what the effect of that is at the time it occurs.

THE COURT: At the time Mr. Smith sold the lots, he owned until the middle of the street, and that

would be consistent with the earlier subdivision. Am I correct when I say that?

MR. POTTER: Yes, I believe so.

THE COURT: When he sold those lots, he sold what he had, except he did not convey – I'm still not sure of this. He sold what he had, and it's described in the same way as is described on the lot, but he nontheless retained an interest from the lot line until the middle of the street. He retained that piece of property.

MR. POTTER: Yes.

THE COURT: All right. Now, in retaining that piece of property, did – I'm under the impression that if there's a street adjacent to a roadway, there's an easement by necessity. People have the right – you cannot sell a land lot as a piece of property. I mean, as a matter of law, there's a street. What is the functional difference between what Mr. Smith sold, i.e. that different lot, and what – and that which is described on the [p. 14] map?

MR. POTTER: Well, I think the functional difference is that he contemplated and it was his theory, both here and at the trial level, that he was entitled to take those alley portions and tack them on to some other lot in the vicinity, whether it was the one immediately adjacent or one located in some other vicinity.

THE COURT: Well, I understand that. But this may be one of those rare cases where two wrongs make a right for the buyer, because it may well be that he's wrong in that assumption, and indeed, all he did was convey an earlier subdivided lot. He didn't have the power to do anything else.

MR. POTTER: Well, I think you're looking at it from the standpoint of the buyer. And in this case, we need to look at it from the standpoint of the Subdivision Map Act, which, in this Court's recent opinion in the San Dieguito case, seems to make clear to me that a – the Map Act is comprehensive, and one can rely on an exemption. For example, for a lot line adjustment, what one must go through, the process to qualify for that lot line adjustment.

What Mr. Smith was attempting to do was separate the alley from the lot and tack it on to his other lot. That's a lot line adjustment. He didn't go through the application process, but that lot line adjustment.

So we had the alley segment sitting there, unattached to Lot H or attached to Mr. Smith's other lots, and we really had a division of that alley from one lot. It had not qualified to be attached to another lot by way of a preapproved lot line adjustment.

[p. 15] THE COURT: Mr. Potter, so if I understand your case, all of this is built on an interpretation of the 1910, 1913 subdivision map, which shows a grid overlaying on this property of lots with streets and alleys delineated. And you're relying on the presumption that those lots include the fee to the center line of the streets and alleys with an easement.

MR. POTTER: Yes.

THE COURT: And later – what, 1925? – those streets and alley are vacated –

MR. POTTER: Correct.

THE COURT: – and therefore, the fee, the easement goes away. The fee goes to the center lines. We don't have any streets and alleys now laid out in this. That will come later. And your position is that Mr. Smith, when he – purportedly excluding those formerly delineated streets and alleys, has divided those properties, not from the 1920, but from the original 1910 delineation, which included, by presumption, the fee to the center line, I think.

MR. POTTER: Yes. I think that's a fair statement. If the streets was simply a grant of an easement, the lots did – always included the fee, and it was the – as Mr. Smith points out in *Baker v. Ramirez* – the question of "use and possession" that made the vacation in 1925 of interest to people.

THE COURT: Picking up from what Justice Kremer said and understanding that, let's assume that Mr. Smith is wrong. In other words, You can't do what you did. But the law will treat it as having deeded to the mid point of the street. And you can't take that away. And so that the law will have treated, [p. 16] then, his having not being in violation of the Subdivision Map Act. Assuming that just for the purpose of the question.

With the effect of that, assuming we were to say that, what's the practical effect? What have we done other than the abstract violation of the statute? How did it impact the rights of the parties here and all of that other litigation that's floating around out there?

MR. POTTER: Well, there is other litigation floating around, and I wouldn't purport to talk or express how that affects the rights of the buyers of the lots who

have sued for rescission. I suppose if the Court says that, No, he didn't violate the Map Act, then the rescission action fails on that basis.

THE COURT: What does it do vis-a-vis the City? I mean, what are the ramifications of this?

MR. POTTER: To tell you the truth –

THE COURT: I mean, this really may be a tempest. I mean, I don't – I mean, do we –

MR. POTTER: I think the problem, with Mr. Smith's own making – and the City made every effort to give Mr. Smith an easy out. He had advance notice of this alley issue way back in June of 1990. He was given the opportunity, as part of the certificate of compliance hearing of deeding the alleys back to the buyers. His counsel proposed doing that. The City said, Yes, that will be acceptable. That will solve the problem. And unfortunately, it didn't come to pass.

THE COURT: Assuming we eliminate – we develop a revisionist's view of history and correct that which should have [p. 17] been corrected, again, I'm curious – I'm not saying it's right. I'm curious of the practical ramifications. And I gather, from your body language, there are none. I'm not saying it's right. I'm not saying we should do it. We have to follow the law. But I gather that nothing happens. There's some litigation that can be affected, but nothing happens here other than the fact that he prevails on his writ of mandate.

MR. POTTER: Well, I hesitate to predict the future. I think you've got to look to the future as well as

the past. And it seems to me that the City felt an obligation to follow the language of the Map Act, and it attempted to analyze the lots, the alleys, and the presumptions in – the best it could. And it seems to me that that analysis was correct.

The Court's suggestion is certainly one that would make some sense as a way of resolvilng all of this litigation in favor of Mr. Smith. I'm not sure it would resolve it to the satisfaction –

THE COURT: Well, it would resolve it in favor of Mr. Smith by saying he didn't do what he thought he did. He wouldn't be happy with that because he wouldn't have the fragments of lots.

Mr. Potter, we've taken you past your time, too, and – assuming no more questions, and we'll hear briefly from Mr. Smith.

MR. POTTER: All right. Very well.

MR. SMITH: My ears are hearing some confusion, which I would like to address as I understand the situation.

THE COURT: Hard to believe, Mr. Smith.

[p. 18] MR. SMITH: I'm not going to recite Civil Code Section 831 and 1112 because they're so very brief for this body that I would be insulting to you to do so. In addition to that, the same would be true of this Court's earlier decision in San Dieguito Partnership. Let's back up, and I want to make only brief points.

In order to have a subdivision, I must not convey a unit as reflected on the assessor's map pursuant to 66424.

I'm going to respond to your question, if I may, Judge Wiener, I believe it is. If we – if you analyze Civil Code Sections 831 and 1112, you will see that if I had remained silent and not declared my intent on the vacated alleys, then they could have brought a quiet title action, and I'd lose, because that's what those two sections say. I didn't do that for that exact very same reason.

These alleys, by agreement – first off, it's perfectly legal for me to apportion – I own those vacated alleys in fee. It's an exhibit in the documents. My predecessor owned them, and his predecessor owned them. Therefore, if I'm silent, the Court will pass title in a quiet title to the buyer, and they're absolutely right in doing so because I didn't express a contrary intent.

THE COURT: Mr. Smith, we only have a few seconds left.

MR. SMITH: Bear in mind – and we briefed this – this isn't an access problem. The City required a 20-foot access easement for these lots, and all of my buyers have fee title, plus access to the lot over the 20-foot access lot line. He makes it – none of these quiet title action cases require lot [p. 19] lines. Just read the Court's own cases.

Buyer and seller agreed that portions of H, I, and J would be returned to me upon the City's approval of a lot line. Now, that's another story, but that has nothing to do with the vacated alley.

THE COURT: But my question earlier was, when you conveyed Lot H –

MR. SMITH: Yes.

THE COURT: – it was a different legal description than Lot H on the map.

MR. SMITH: I'm sorry, but that's absolutely an incorrect statement.

THE COURT: It was the same legal description?

MR. SMITH: Exactly the same.

THE COURT: All right. Thank you.

MR. SMITH: And a contrary intent was expressed concerning the alley. The conveyance on H, I, J, and U – all of the lots is per the map.

THE COURT: I'll put a dot on it and leave it right there.

MR. SMITH: Thank you.

THE COURT: Thank you, gentlemen. The matter is submitted.

MR. SMITH: Thank you.

[p. 20] (Proceedings adjourned.)

CERTIFICATE

I certify that the foregoing is a verbatim transcription prepared from the electronic sound recording of the proceedings provided to me, and that said transcription is a true and accurate transcript to the best of my ability and belief.

/s/ Shonna D. Ruane — 7-30-93
Transcriber — Date

APPENDIX K

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH

JAMES E. SMITH, Petitioner, v. CITY COUNSEL OF THE CITY OF DEL MAR; CITY OF DEL MAR, a municipal corporation; and DOES I through 100, inclusive, Respondents.	Case No. N 50142 MV ORDER AND JUDGMENT DENYING WRIT OF MANDATE (Filed July 9, 1991)

Petitioner James E. Smith's Motion for Judgment on Petition for Writ of Mandate came on for hearing on June 18, 1991 at 8:15 a.m. in Department H of the above entitled court, the Honorable Ronald S. Prager presiding. Petitioner James E. Smith was present and appeared through his then-attorney of record, Robert L. Zajac of Hillyer & Irwin; respondents the City Council of the City of Del Mar and the City of Del Mar appeared through their attorney of record, Mark A. Potter.

The court having considered the exhibits, declarations, Memoranda of Points and Authorities submitted by petitioner and respondents, the evidentiary objections and having heard the oral argument on this matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Petitioner's Motion for Judgment on the Petition is denied and the Writ of Mandate is denied for the reasons set forth in this court's oral statement of decision rendered on June 18, 1991; and

Judgment shall be entered in favor of the City of Del Mar and the City Counsel of the City of Del Mar.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: JUL – 9 1991

/s/ Ronald S. Prager
RONALD S. PRAGER
Judge of the Superior Court

APPROVED AS TO FORM:

Dated: ____

NOT SIGNED

JAMES E. SMITH
Petitioner

APPENDIX L

Robert L. Zajac, Esq. – Bar No. 110164
HILLYER & IRWIN
A professional Corporation
Attorneys At Law
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(619) 234-6121
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Attorneys for Petitioner JAMES E. SMITH

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

NORTH COUNTY BRANCH

JAMES E. SMITH, Petitioner, v. CITY COUNCIL OF THE CITY OF DEL MAR; CITY OF DEL MAR, a municipal corporation; and DOES 1 through 100, inclusive, Respondents.	CASE NO. N 50142 PETITION FOR WRIT OF MANDATE (CCP §1094.5; Gov. Code § 66499.37) (Filed Jan. 28, 1991)

Petitioner respectfully represents:

1. Petitioner JAMES E. SMITH ("SMITH") is an individual residing in the CITY OF DEL MAR ("DEL MAR") and on December 9, 1977, purchased certain real property in DEL MAR known as the Snakewall property, which is more particularly identified herein as follows:

Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots as closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285, filed in the Office of County Recorder of San Diego County. Together with Lots A and B in Block 37 and T and U in Block 12, together with that portion in "Gatun Street" lying Southeasterly of the Southwesterly prolongation of the Northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of County Recorder of San Diego County. Together with Lots 780 through 785 inclusive, together with the portion of "Oriba Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592, filed in the Office of County Recorder of San Diego County.

A true and correct copy of SMITH's grant deed by which title was vested in SMITH for the Snakewall property is attached hereto and incorporated herein as Exhibit "A".

2. With regard to Subdivision Map No. 1285 referenced above, it was recorded in the Official Records of San Diego County on September 22, 1910. A true and correct copy of said map is attached hereto and incorporated herein as Exhibit "B."

3. With regard to Subdivision Map No. 1343 referenced above, it was recorded in the Official Records of

San Diego County on June 8, 1911. A true and correct copy of said map is attached hereto and incorporated herein as Exhibit "C."

4. With regard to Subdivision Map No. 1592 referenced above, it was recorded in the Official Records of San Diego County on July 18, 1913. A true and correct copy of said map is attached hereto and incorporated herein as Exhibit "D."

5. Respondent THE CITY COUNCIL OF THE CITY OF DEL MAR ("CITY COUNCIL") is the governing agency of DEL MAR, a municipal corporation in the State of California.

6. Respondent DEL MAR is a municipal corporation in the State of California.

7. Respondents DOES 1 through 100, inclusive, whether individual, corporate or otherwise, are fictitious names of respondents whose true names are not at this time known to petitioner; petitioner is informed and believes and thereon alleges that each of said fictitiously named respondents, whether individuals, partnerships, agencies, departments, corporations or otherwise, are in some way liable or responsible to the petitioner on the facts hereinafter alleged and at such time as respondents' true names become known to petitioner, petitioner will ask leave of the court to amend this petition to insert said true names.

8. Petitioner is informed and believes and thereon alleges that respondents, and each of them, including those designated as DOES 1 through 100, at all times herein mentioned were the agents, servants, and

employees of the remaining respondents, and as such, within the times mentioned herein were acting within the purpose, course and scope of such agency, service and employment, and with the consent, permission and ratification of the remaining respondents.

9. On or about July 15, 1986, respondent DEL MAR, through Lisa Strandgaard, Director of Planning and Community Development, forwarded to counsel for petitioner SMITH a letter setting forth that all of the Snakewall property lots shown on Arden Heights Unit No. 3, Map 1285, Arden Heights Unit No. 4, Map 1343, and Arden Heights No. 6, Map 1592 are legal lots of record. A true and correct copy of Ms. Strandgaard's communication of July 15, 1986 is attached hereto and incorporated herein as Exhibit "E."

10. On or about July 6, 1987, respondent DEL MAR, through its CITY COUNCIL, adopted a resolution of that date which contains as one of its findings: "The Snakewall property is comprised of 20 lots of record which can be developed in accordance with the Municipal Code." A true and correct copy of this resolution is attached hereto and incorporated herein as Exhibit "F."

11. On or about June 14, 1988, Margaret L. Roulette, as trustee under that certain Declaration of Trust executed on November 29, 1971 ("Margaret Roulette"), purchased two Snakewall lots, specifically lots "I" and "J" in Block 12 of Arden Heights Unit No. 3, according to above-referenced Map No. 1285. The grant deed conveying lots "I" and "J" to Margaret L. Roulette specifically excluded a portion of an alley adjoining lots "I" and "J" as closed to public use. Title to these portions of the

vacated alley adjoining lots "I" and "J" was retained by SMITH. A true and correct copy of Margaret Roulette's grant deed from SMITH is attached hereto and incorporated herein as Exhibit "G."

12. On or about April 15, 1988, Scott and Robin Emsley, Trustees under that certain Declaration of Trust dated April 18, 1983, ("the Emsleys") purchased lot "H" in Block 12 of Arden Heights No. 3, according to the above-referenced Map No. 1285. The grant deed conveying lot "H" to the Emsleys specifically excluded a portion of an alley adjoining lot "H" as closed to public use. Title to this portion of the vacated alley adjoining lot "H" was retained by SMITH. A true and correct copy of the Emsleys' grant deed from SMITH is attached hereto and incorporated herein as Exhibit "H."

13. On or about October 13, 1989, Delpert Pifer ("Pifer") purchased lot "U" in Block 12 of Arden heights No. 4 according to the above-referenced map 1343. Title to a portion of a vacated alley adjoining lot "U" was retained by SMITH. A true and correct copy of Pifer's grant deed is attached hereto and incorporated herein as Exhibit "I."

14. SMITH has a beneficial interest in lots "H", "I", "J" and "U" as SMITH is a beneficiary under certain deeds of trust for those lots.

15. On or about September 24, 1990 the City of Del Mar conducted an administrative hearing regarding certain certificates of compliance for lots "H", "I", and "J." At this hearing on September 24, 1990 attorney Allen Haynie representing Margaret L. Roulette and the Emsleys requested that a notice of violation be recorded

on lots "H", "I" and "J" at the Snakewall property. A true and correct copy of DEL MAR's minutes of this administrative hearing is attached hereto and incorporated herein as Exhibit "J."

16. A verbatim transcript of this administrative hearing held on September 24, 1990 was also prepared. A true and correct copy of this verbatim transcript is attached hereto and incorporated herein as Exhibit "K."

17. On or about September 28, 1990, THE CITY OF DEL MAR forwarded intentions to record a notice of violation for lots "H", "I" and "J" to Roulette and the Emsleys. True and correct copies of these intentions to record a notice of violation are attached hereto and incorporated herein as Exhibit "L."

18. With regard to DEL MAR's intentions to record a notice of violation for lots "H", "I" and "J", SMITH provided his submittal in opposition on or about October 13, 1990. A true and correct copy of this submittal is attached hereto and incorporated herein as Exhibit "M."

19. On or about October 30, 1990, the CITY OF DEL MAR recorded notices of violation of illegal subdivision for lots "H", "I" and "J" of the Snakewall property. True and correct copies of these notices of violation are attached hereto and incorporated herein as Exhibit "N."

20. On or about November 5, 1990, the CITY COUNCIL for DEL MAR continued an administrative hearing scheduled for that date with regard to the CITY staff's recommendation regarding recording the notices of violation for lots "H", "I" and "J." A true and correct

copy of this staff report is attached hereto and incorporated herein as Exhibit "O."

21. On or about November 3, 1990, SMITH provided his response to the staff report attached hereto as Exhibit "O" with regard to the notices of violation for lots "H", "I" and "J." A true and correct copy of SMITH's November 3, 1990 submittal is attached hereto and incorporated herein as Exhibit "P."

22. On or about November 19, 1990, respondent CITY COUNCIL voted to record the notices of violation. A true and correct copy of a transcript of that CITY COUNCIL administrative hearing is attached hereto and incorporated herein as Exhibit "Q."

23. At subsequent CITY COUNCIL meeting on December 3, 1990, SMITH objected to the minutes of the meeting at which the decision to record these notices of violations was made. A true and correct copy of a transcript of the CITY COUNCIL meeting at which SMITH objected to the minutes of the November 19, 1990 meeting is attached hereto and incorporated herein as Exhibit "R."

24. DEL MAR'S and the CITY COUNCIL's actions in recording the notices of violation for lots "H", "I" and "J" and the administrative hearing of November 19, 1990 at which it was decided to record notices of violation for the vacated alley adjoining lots "H", "I" and "J" are invalid as such actions and decisions:

a) Violate various provisions of the Government Code, including but not limited to Government Code §§ 66412.7, 66412.6(a), 66512.6(b), and 66499.35;

b) Violate additional California statutory and decisional law;

c) Have no California precedent on which such actions and decisions was based;

d) Were based on an incomplete, inaccurate and inconsistent record;

e) Were motivated by political reasons to stop development at the Snakewall property;

f) Were an abuse of discretion as the respondents failed to proceed in the manner required by law;

g) Were not supported by the evidence presented to DEL MAR and the CITY COUNCIL OF DEL MAR;

h) Were arbitrary and capricious; and

i) Are estopped from being effective based on earlier actions and decisions by respondents.

25. On or about December 6, 1990, DEL MAR forwarded intentions to record a notice of violation to Pifer and SMITH with regard to lot "U." A true and correct copy of this intention to record a notice of violation to SMITH is attached hereto and incorporated herein as Exhibit "S."

26. On or about December 8, 1990, SMITH provided his submittal to DEL MAR with regard to the intention to record a notice of violation SMITH received. A true and correct copy of this submittal by SMITH is attached hereto and incorporated herein as Exhibit "T."

27. On or about January 14, 1990, the CITY recorded a notice of violation illegal subdivision as to lot "U" owned by Pifer. A true and correct copy of this notice of

violation is attached hereto and incorporated herein as Exhibit "U."

28. On or before January 22, 1991, DEL MAR provided its staff report which recommended that a notice of violation be recorded on a portion of a vacated alley adjoining lot "U" title to which was retained by SMITH. A true and correct copy of this staff report is attached hereto and incorporated herein as Exhibit "V."

29. On or about January 21, 1991, SMITH provided to CITY COUNCIL his submittal regarding the CITY COUNCIL's administrative hearing with regard to whether to record a notice of violation of illegal subdivision regarding a portion of a vacated alley adjoining lot "U." A true and correct copy of this submittal is attached hereto and incorporated herein as Exhibit "W."

30. On or about January 22, 1991, the CITY COUNCIL held and closed its administrative hearing with regard to recording a notice of violation of illegal subdivision regarding a portion of a vacated alley adjoining lot "U" without any determination being made. A true and correct copy of a transcript of this administrative hearing is attached hereto and incorporated herein as Exhibit "X."

31. DEL MAR's and the CITY COUNCIL's actions in recording the notice of violation for lot "U" on January 14, 1991, and any action to record a notice of violation for a portion of the vacated alley adjoining lot "U" are invalid as such actions and decisions:

a) Violate various provisions of the Government Code, including but not limited to Government Code §§ 66412.7, 66412.6(a), 66512.6(b), and 66499.35;

b) Violate additional California statutory and decisional law;

c) Have no California precedent on which such actions and decisions was based;

d) Were based on an incomplete, inaccurate and inconsistent record;

e) Were motivated by political reasons to stop development at the Snakewall property;

f) Were an abuse of discretion as the respondents failed to proceed in the manner required by law;

g) Were not supported by the evidence presented to DEL MAR and the CITY COUNCIL;

h) Were arbitrary and capricious; and

i) Are estopped from being effective based on earlier actions and decisions by respondents.

32. On or about June 20, 1988, and shortly after the close of escrow for lots "H", "I" and "J" at the Snakewall property, petitioner SMITH provided to DEL MAR copies of the grant deeds attached hereto as Exhibits "G" and "H" and all escrow documents which clearly notified DEL MAR that SMITH's purpose in retaining title to the vacated alley adjoining lots "H", "I" and "J" was to facilitate access and utility easements pursuant to the lot line adjustment or parcel map agreed to in the subject escrows.

33. As an incident to bringing this proceeding, petitioner SMITH has become and is obligated to personally pay his counsel, Hillyer & Irwin, APC, attorney's fees in an amount unknown at this time. SMITH will seek his attorney's fees pursuant to Government Code § 800, as

DEL MAR's and the CITY COUNCIL's actions in this matter are invalid, arbitrary and capricious.

WHEREFORE, petitioner SMITH prays judgment as follows:

1. For a writ of mandate directing that the respondents set aside the recorded notices of violation on lots "H", "I" "J" and "U", and to remove and provide a clearance of those notices of violation pursuant to Government Code § 66499.37;

2. For a writ of mandate directing that respondents set aside their determinations to record a notice of violation for a portion of the vacated alley adjoining lots "H", "I" and "J", title to which was retained by SMITH;

3. For writ of mandate directing that respondents do not record a notice of violation for a portion of a vacated alley adjoining lot "U", title to which was retained by SMITH;

4. For reasonable attorney's fees according to Government Code § 800 in an amount of $7,500.00, or according to proof;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court deems just and proper.

Dated: January 28, 1991

HILLYER & IRWIN

By: /s/ Robert L. Zajac
Robert L. Zajac
Attorneys for Petitioner
HILLYER & IRWIN

VERIFICATION

(CCP §§ 446, 1086, 1109)

I, JAMES E. SMITH, am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was executed at Del Mar, California on January 24, 1991.

/s/ James E. Smith
JAMES E. SMITH

APPENDIX M

City of Del Mar
Staff Report

TO: Honorable Mayor and City Council

FROM: J.D. Sandoval, Planning Director
Via Gloria Curry, City Manager
Prepared by Monica Tuchscher,
Associate Planner

DATE: November 5, 1990

SUBJECT: Determination of whether to record a Notice of Violation of illegal subdivision regarding Lots H, I, J, in Block 12, of Arden Heights Unit No. 3 according to Map No. 1285.

ISSUE:

Determination of whether to record a Notice of Violation of illegal subdivision regarding Lots H, I, J, in Block 12, of Arden Heights Unit No. 3.

RECOMMENDATION:

Record Notice of Violation for the above-mentioned lots.

BACKGROUND:

Early this year, Scott Emsley and Margaret Roulette property owners of a portion of Lots H, I, J, in Block 12, of Arden Height [sic] Unit No. 3 (hereinafter referred to as "New Lots H, I, and J" or "New Lots"), filed applications for Certificates of Compliance for the "New Lots", as described above.

The purpose of a Certificate of Compliance is to determine whether a property or lot complies with the provisions of the Subdivision Map Act (Map Act). The Map Act affirms that any parcel of land created prior to March 4, 1972, shall be presumed to have been lawfully created. Therefore, staff must define what was inclusive of the lot or lots prior to March 4, 1972 and compare that information to the "New Lot's" current legal description.

In this case, in order to determine what was inclusive of the three lots in question, staff examined the grant deeds, titles, and subdivision mapping which occurred prior to March 4, 1972. The following is a history (in condensed version) of Lots H, I, J, in Block 12, of Arden Heights Unit No. 3, according to Map No. 1285:

> September 22, 1910, a subdivision was filed and recorded by the County Recorder which created Arden Heights Unit No. 3, Map #1285. At that time, the following lots (hereinafter refer to as "Old Lots") were legally created:
>
> - Lot H, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County (hereinafter refer to as "Old Lot H").
>
> - Lot I, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County (hereinafter refer to as "Old Lot I").
>
> - Lot J, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of

San Diego County (hereinafter refer to as "Old Lot J").

Then on July 20, 1925, the County Board of Supervisors held a hearing to consider a petition filed by E.C. Batchelder, et al., to vacate the following alleys/roads located adjacent to the "Old Lots":

A ten (10) foot alley running from Zapo Street to Serpentine Drive between Lots L, J, I, and Lots M, N, G.

A ten (10) foot alley running from Zapo Street to Serpentine Drive between Lots N, H, and Lots O, G.

A fifteen (15) foot alley running from Zapo Street to Serpentine Drive between Lots T in Arden Heights No. 4, Lot S in Arden Heights No. 3, Lot 760 in Arden Heights No. 6 and Lots J, I, H, G in Arden Heights No. 3, All three alleys mentioned above are located in Block 12 of Arden Heights No. 3.

Subsequent to the hearing, the County Board of Supervisors approved and declared the above mentioned alleys/roads

"vacated, abandoned and discontinued". The alley vacation was then recorded by the County Recorder on July 31, 1925 (Attachment B) and the alleys/roads were united into the adjoining properties. Thus, *as of July 31, 1925, the "Old Lots" H, I, and J were inclusive of the property/area delineated as alleys/roads* above.

Staff has concluded that in 1988, upon the transfer of the property to the current owners, not all of the "Old Lot" area was conveyed. Namely, the alley portions of each of

the "Old Lots" was retain by the seller. Therefore, staff concludes that the Emsley/Roulette properties, as described in the current deeds *do not comply* and *were not* created in compliance with the provisions of the Subdivision Map Act or the City of Del Mar's Subdivision Ordinance.

Government Code section 66499.35 (b) states:

> "If a local agency determines that the real property does not comply with the provisions of this division or of local ordinances enacted pursuant thereto, it shall issue a certificate of compliance or a conditional certificate of compliance. . . . "

The function of "conditioning" a certificate of compliance is to impose any conditions which would have been applicable to the division of the property at the time the applicant acquired his or her interest in the property. Government Code section 66499.35 (b) states that a local agency may, as a condition to granting a certificate of compliance:

> " . . . impose any conditions which would have been applicable to the division of the property at the time the applicant acquired his or her interest therein, and which had been established at that time by this division or local ordinance enacted pursuant thereto, except that where the applicant was the owner of record at the time of the initial violation of provisions of this division or of local ordinances enacted pursuant thereto who by a grant of the real property created a parcel or parcels in violation of this division or local ordinances enacted pursuant thereto, and the person is the current owner of record of one or more of the parcels which were created as a

> result of the grant in violation of the division or local ordinance enacted pursuant thereto, then the local agency may impose any conditions which would be applicable to a current division of the property. Upon making the determination and establishing the conditions the city or county shall cause a conditional certificate of compliance to be filed for record with the recorder of the county in which the real property is located. The certificate shall serve as notice to the property owner or vendee who has applied for the certificate pursuant to this section, a grantee of the property owner, or any subsequent transferee or assignee of the property that the fulfillment and implementation of these conditions shall be required prior to subsequent issuance of a permit or other grant of approval for development of the property.

On September 24, 1990, staff held an Administrative Hearing to consider the merits of issuing a *conditional* certificate of compliances for the "New Lots" subject to the following condition:

1. Prior to the issuance of a permit or other grant of approval for development of the properties, the portions of the alley, vacated by the County, and retained by the seller, during the 12988 sale must be acquired and added to the "New Lots" in question. Or in the alternative, a parcel map or subdivision map shall be accomplished to show the alley as separate and a part from the "New Lot".

At the end of the Administrative Hearing, the applicants representative request that the City issue a Notice of Violation on the three "New Lots" and continue the Administrative Hearing to November 13, 1990.

ANALYSIS:

The directive for issuing a notice of violation is set forth in the Municipal Code section 66499.36 as follows:

> "Whenever a local agency has knowledge that real property has been divided in violation of the provisions of the division or of local ordinances enacted pursuant to this division, it shall cause to be mailed by certified mail to the then current owner of record of the property a notice of intention to record a notice of violation, describing the real property in detail, naming the owners thereof, and stating than [sic] an opportunity will be given to the owner to present evidence. The notice shall specify a time, date, and place for a meeting at which the owner may present evidence to the legislative body or advisory agency why the notice should not be recorded. The notice shall also contain a description of the violations and an explanation as to why the subject parcel is not lawful under subdivision (a) or (b) of Section 66412.6."
>
> "The meeting shall take place no sooner than 30 days and no later than 60 days from the date of mailing. If, within 15 days of receipt of notice, the owner of the real property fails to inform the local agency of his or her objection to recording the notice of violation, the legislative body or advisory agency shall record the notice of violation with the county recorder. If, after the owner has presented evidence, it is determined that there has been no violation, the local agency shall mail a clearance letter to the then current owner of record. If, however, after the owner has presented evidence, the legislative body or advisory agency determines that the property has in fact been illegally divided, the legislative

> body or advisory agency shall record the notice of violation with the county recorder. The notice of violation, when recorded, shall be deemed to be constructive notice of the violation to all successors in interest in such property. the [sic] county recorder shall index the names of the fee owners in the general index."

Staff followed the procedures outlined above and mailed a Notice of Intention to Record a Notice of Violation to the owners of the "New Lots" in question, and set November 5, 1990 as the date which the owner/owners may present evidence as to why the notice of violation should not be recorded.

It should be noted that the owners (Emsley/Roulette) of "New Lots" H, I, and J have not filed an objection to filing the Notice of Violation. However, the seller of the "New Lots" (Jim Smith), who holds title to a portion of the "Old Lots" did object, therefore the purpose of the administrative hearing is to allow Mr. Smith the opportunity to present evidence as to why the Notice of Violation should not be filed with the County Recorder.

RECOMMENDATION:

In conclusion, basis [sic] upon the findings outlined in the staff report, staff recommends the filing of Notices of Violation for the lots mentioned above.

MT/

APPENDIX N

RECORDING REQUESTED BY AND MAILED TO: City Clerk City of Del Mar 1050 Camino del Mar Del Mar, CA 92014	THE ORIGINAL OF THIS DOCUMENT WAS RECORDED ON OCT 30 1990 FILE/PAGE NO 90-587840 VERA L. LYLE, COUNTY RECORDER SPACE ABOVE FOR RECORDER'S USE

NOTICE OF VIOLATION
ILLEGAL SUBDIVISION

NOTICE IS HEREBY GIVEN that the following described real property was illegally subdivided:

Portion of lot H, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County.

Assessor's

Parcel Number: 299-261-26

Current owner

of record

of portion: S. Scott Emsley &
Robin Emsley

Not all of the lot area existing prior to March 4, 1972 was transferred to the current owner. Namely, the abandoned alley portions of the lot were retained by the seller.

Date: 10-30-90

Signed: /s/ M. Tuchscher
for J.D. Sandoval
Planning Director
City of Del Mar

RECORDING REQUESTED BY AND MAILED TO:

City Clerk
City of Del Mar
1050 Camino del Mar
Del Mar, CA 92014

THE ORIGINAL OF THIS DOCUMENT WAS RECORDED ON OCT 30 1990 FILE/PAGE NO 90-587841 VERA L. LYLE, COUNTY RECORDER

SPACE ABOVE FOR RECORDER'S USE

NOTICE OF VIOLATION
ILLEGAL SUBDIVISION

NOTICE IS HEREBY GIVEN that the following described real property was illegally subdivided:

Portion of lot I, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County.

Assessor's

Parcel Number: 299-261-27

Current owner

of record

of portion: Margaret Roulette

Not all of the lot area existing prior to March 4, 1972 was transferred to the current owner. Namely, the abandoned alley portions of the lot were retained by the seller.

Signed: /s/ M. Tuchscher Date: 10-30-90
for J.D. Sandoval
Planning Director
City of Del Mar

RECORDING REQUESTED BY AND MAILED TO: City Clerk City of Del Mar 1050 Camino del Mar Del Mar, CA 92014	THE ORIGINAL OF THIS DOCUMENT WAS RECORDED ON OCT 30 1990 FILE/PAGE NO 90-587842 VERA L. LYLE, COUNTY RECORDER SPACE ABOVE FOR RECORDER'S USE

NOTICE OF VIOLATION
ILLEGAL SUBDIVISION

NOTICE IS HEREBY GIVEN that the following described real property was illegally subdivided:

Portion of lot J, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County.

Assessor's

Parcel Number: 299-261-27

Current owner

of record: Margaret Roulette

Not all of the lot area existing prior to March 4, 1972 was transferred to the current owner. Namely, the abandoned alley portions of the lot was retained by the seller.

Signed: /s/ M. Tuchscher Date: 10-30-90
for J.D. Sandoval
Planning Director
City of Del Mar

APPENDIX O

RECORDING REQUESTED BY AND MAILED TO:

City Clerk
City of Del Mar
1050 Camino del Mar
Del Mar, CA 92014

Recorded
1991 Jan 14 pm 3:55
No. 91-018116

NOTICE OF VIOLATION
ILLEGAL SUBDIVISION

NOTICE IS HEREBY GIVEN that the following described real property was illegally subdivided:

A Portion of lot U, in Block 12 of ARDEN HEIGHTS UNIT NO. 4, according to Map thereof No. 1343, filed in the office of the County Recorder of San Diego County, described as:

Assessor's

Parcel Number: 299-192-24

Current owner

of record

of portion: Delbert Pifer

Not all of the lot area existing prior to March 4, 1972 was transferred to the current owner. Namely, the vacated portion of Gatun was retained by the seller.

Signed: /s/ James Sandoval Date: January 11, 1991
J.D. Sandoval
Planning Director
City of Del Mar

APPENDIX P

city of del mar

DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT

July 15, 1986

Robert L. Zajac
Hillyer and Irwin
530 B Street, 14th Floor
San Diego, CA 92101-4479

Re: Snakewall Property

Dear Mr. Zajac:

As we discussed, the City has determined that the Snakewall Property was legally subdivided in the early 1900's. These lots are considered to be legal lots of record, and are potentially buildable, subject to final review by the Department of Planning and Community Development. Some of the lots may have easement access difficulties, so individuals interested in acquiring these properties should thoroughly investigate the sites and the access.

The lots which now can be validly sold are the following:

(1) Arden Heights #3, Map #1285, recorded September 22, 1910, which sets forth Lots G, H, I, J, K, L, M, N, O, and S.

(2) Arden Heights #4, Map 1343, recorded June 8, 1911, which sets forth Lots A, B, T, and U.

(3) Arden Heights #6, Map 1592, recorded July 18, 1913, which sets forth Lots 780, 781, 782, 783, 784, and 785.

Sincerely,

/s/ Lise Strandgaard
LISE STRANDGAARD
Director of Planning and
Community Development

APPENDIX Q

Order Number 767125-11

Escrow Number 1-21367

RECORDING REQUESTED BY

AND WHEN RECORDED MAIL THIS DEED AND UNLESS OTHERWISE SHOWN BELOW, MAIL TAX STATEMENTS TO:

James E. Smith
2204 Ocean Front
Del Mar, CA 92014

Recorded Dec. 9, 1977
File/Page No. 77-508720

SPACE ABOVE THIS LINE
FOR RECORDER'S USE

Parcel No. (11001) 877-003-17; 299-261-12; 299-261-13; 299-200-06;-07;08; 299-192-09;10;11; and 12.

Del Mar
(City)

TRANSFER TAX PAID
HARLEY F. BLOOM
RECORDER

CORPORATION GRANT DEED
THE UNDERSIGNED GRANTOR DECLARES
DOCUMENTARY TRANSFER TAX IS $885.50

X computed on full value of property conveyed, or

_ computed on full value less value of liens or encumbrances remaining at time of sale, and HOME BUSINESS DEVELOPMENT CORPORATION a corporation organized under the laws of the state of California For a valuable Consideration, the receipt of which

is hereby acknowledged, hereby GRANTS To James E. Smith, an unmarried man all that real property situated in the County of *San Diego,* State of California, described as follows:

Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots are closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285, filed in the Office of County Recorder of San Diego County. Together with Lots A and B in Block 37 and T and U in Block 12, together with that portion in "Gatun Street" lying Southeasterly of the Southwesterly prolongation of the Northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of County Recorder of San Diego County. Together with Lots 780 through 785 inclusive, together with that portion of "Oriba Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592, filed in the Office of County Recorder of San Diego County.

In Witness Whereof, said corporation has caused its corporate name and seal to be affixed hereto and this instrument to be executed by its ____ President and ____ Secretary thereunto duly authorized.

Dated: December 6, 1977

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On *December 8, 1977* before me, the undersigned, a Notary Public in and for said State, personally appeared *John W. Guth,* known to me to be the ___ President, and *C.O. McEfee* known to me to be *Vice President* of the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the within instrument pursuant to its by-laws or a resolution of the board of directors. WITNESS my hand and official seal.

Signature Leticia M. Belanger
Leticia M. Belanger

Home Business Development Corporation

By _____
John W. Guth President

By _____
C. O. McEfee Secretary

[SEAL]
OFFICIAL SEAL
LETICIA M. BELANGER
NOTARY PUBLIC – CALIFORNIA
Principal Office, San Diego Co., Calif.
My Commission Exp. Dec. 11, 1990

(This area for official notarial seal)
MAIL TAX STATEMENTS TO PARTY SHOWN ON FOLLOWING LINE: IF NO PARTY SHOWN, MAIL AS DIRECTED ABOVE

_____

APPENDIX R

RECORDING REQUESTED BY

AND WHEN RECORDED
MAIL THIS DEED AND,
UNLESS OTHERWISE
SHOWN BELOW, MAIL
TAX STATEMENTS TO:
NAME
S. Scott Emsley and
Robin S. Emsley
STREET
ADDRESS

CITY
STATE
ZIP

Recorded
April 15, 1988

Doc. No.
88-75433

SPACE ABOVE THIS LINE FOR RECORDER'S USE

ALL PIN.

Title Order No. _____

Escrow or Loan No. 7733-C

GRANT DEED

THE UNDERSIGNED GRANTOR(s) DECLARE(s)

DOCUMENTARY TRANSFER TAX is $ CITY TAX $

[ ] computed on full value of property conveyed, or

[ ] computed on full value less value of liens or encumbrances remaining at time of sale,

[ ] Unincorporated area: [xx] City of Del Mar, and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged.

JAMES E. SMITH, an unmarried man

hereby GRANT(S) to
S. SCOTT EMSLEY and ROBIN S. EMSLEY, Trustees under that certain Declaration of Trust dated April 18, 1983

the following described real property in the city of Del Mar

County of San Diego State of California:

PARCEL 1: Lot "H" in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County.

SPECIFICALLY EXCLUDING, HOWEVER, that portion of the alley adjoining said Lot "H" as closed to public use.

RESERVING THEREFROM an easement retained by Seller over a portion of Lot "H" AS MORE FULLY DESCRIBED ON EXHIBIT "B" ATTACHED HERETO AND MADE A PART HEREOF.

PARCEL 2: A utility and sewer easement over, under, along and across that certain alley between Lots "N" and "O", "H," "I," and "N," "H" and "G," "L" and "N," and "L" and "M" in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County, all from the public street known as Zapo Street.

PARCEL 3: An access and utility easement for the benefit of said Lot "H" AS MORE FULLY DESCRIBED ON EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

PARCEL 4: A utility easement for the benefit of said Lot "H" AS MORE FULLY DESCRIBED ON EXHIBIT "D" ATTACHED HERETO AND MADE A PART HEREOF.

Grantee, by acceptance of this Deed, agrees, for himself, his heirs, successors and assigns, to the restrictions contained in EXHIBIT "E" ATTACHED HERETO AND MADE A PART HEREOF.

Dated March 15, 1988
STATE OF CALIFORNIA)
)ss
COUNTY OF San Diego)
On April 15th, 1988 before me, the undersigned a Notary Public in and for said State, personally appeared James E. Smith personally known to me to be the person ___ whose name is subscribed to the within instrument and acknowledged that he executed the same.
WITNESS my hand and official seal.
Signature /s/ Dee Goodrich

/s/ James E. Smith
James E. Smith @4-15-88

[SEAL]
(This area for official notarial seal)

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

FILED
SEP 30 1993
OFFICE OF THE CLERK

(3)

No. 93-359

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

vs.

CITY COUNCIL OF THE CITY OF DEL MAR; CITY OF DEL MAR, a municipal corporation; and DOES I through 100, inclusive,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One State Of California

RESPONDENTS' BRIEF IN OPPOSITION

MARK A. POTTER
Counsel of Record
Attorney for Respondents
5090 Shoreham Place, Suite 101
San Diego, CA 92122
(619) 455-9737

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTRODUCTION

There is no basis for this Court to review on writ of certiorari. The petition is frivolous; petitioner is attempting to gain access to this Court by creating, for the first time, an alleged constitutional issue. None of the courts below were presented with the vague issue raised in this petition. Consequently, none of the courts below decided the issue raised. The belated effort to create a question of federal law to obtain certiorari should be summarily rejected. Fees and costs should be awarded against petitioner.

II. STATEMENT OF THE CASE

The City of Del Mar determined that petitioner violated the California Subdivision Map Act. At the time of sale of certain lots, Smith separated the adjacent vacated alleys from lots. As a matter of law in California, a lot presumptively extends to the center line of the adjacent street.

The California Subdivision Map Act contains a comprehensive scheme of regulation to prohibit any alteration of a lot. Even a minor change such as a lot line adjustment must be preapproved. Government Code section 66412(d).

When a local agency such as the City has knowledge that a possible violation of the Subdivision Map Act may have occurred, it is required to follow a specified procedure of recording a notice and giving interested parties an opportunity to be heard. Government Code section 66499.36. The City followed the statutory procedure, held

hearings and made its determination based on the evidence presented.

After the City concluded the administrative hearing process, Smith filed a petition for a writ of administrative mandamus seeking to set aside the City's determination that the violation of the Subdivision Map Act had occurred. As Smith notes in his brief, his superior court petition claimed that the City's determination was "violative of California statutory and case law, no California precedent, politically motivated, abuse of discretion, not supported by evidence presented, arbitrary and capricious and estoppel." (Petition for Writ of Certiorari, page 6.) None of these theories for the alleged invalidity of the City's action in any way suggested a question of federal law. The actual mandamus petition set forth at Appendix to Petition L-8 to L-9 also reveals no federal question.

After the trial of the petition for administrative mandamus, the trial court denied Smith's petition on a number of procedural grounds, not the least of which was Smith's failure to provide the entire administrative record. At the hearing, Smith contended that he was denied due process because he was not provided with adequate notice and opportunity to be heard by the City on the issue of the Map Act violations. The trial court rejected this claim, finding that Smith had received both notice and an opportunity to be heard.

The California Court of Appeal affirmed on this issue, noting that the partial record contradicted Smith's claim. In addition, the California Court of Appeal affirmed that Smith's failure to provide the entire administrative record necessarily constituted a waiver of a due

process claim since the court had not been placed in a position to evaluate his unsubstantiated claim. (Appendix to Petition for Certiorari, C-57 to C-58.)

Smith then petitioned for "Review and Stay" by the California Supreme Court but raised no issue of federal law. The Petition for Review raised three issues for review:

1. Whether the lower court incorrectly interpreted California Civil Code section 831 and 1112;

2. Whether the lower court incorrectly interpreted California Streets and Highways Code section 8351; and

3. Whether the Court of Appeal opinion contained a material fact "misstatement" when it recited that "this case involves a 20-acre property in Del Mar known as the Snakewall Property." (Appendix to Petition for Certiorari, C-9 though C-14.) Thus, no question of federal law was presented to the California Supreme Court.

III. SMITH MISSTATES FACTS REGARDING HIS OPPORTUNITY TO BE HEARD AND THE ALLEGED PREVENTION OF DEVELOPMENT OR SALE OF HIS PROPERTY

Smith falsely contends that he "never had an opportunity to rebut the presumption at the administrative level . . . " Petition for Writ, page 8. As noted in Section II hereof, a similar claim was also made to the appellate court which noted that the record clearly contradicted this assertion:

> " . . . City communicated its concern about the sales of the Snakewall lots without the adjacent

> streets and alleys by June 1990. Smith received notice . . . of the September 24, 1990 hearing . . . Smith attended the meeting and was specifically asked if he wanted to speak but declined to do so. Later, the City held another hearing . . . to allow Smith an opportunity to be heard. Smith spoke at the meeting held in November 1988 [1990]. The record also indicates Smith had notice of the hearing . . . for lot U since he both attended the hearing and submitted written materials." (Court of Appeal Opinion, Appendix to Petition for Certiorari, C-34.)

Also contrary to Petitioner's misrepresentation, he has in fact sold substantial portions of his property. Homes have been developed on these other lots on the property. Smith reconveyed the alleys back to these other lots buyers, thereby negating the violations on these other lots. (Appendix to Petition for Certiorari, C-21.) The only impediment to further development or sales of Petitioner's property is Petitioner's unwillingness to comply with local and state law.

IV. NO GROUNDS EXIST FOR GRANTING CERTIORARI

As noted above, the purported question of federal law was never presented to any of the courts below. Contrary to Petitioner's suggestion, it is clear that Rule 10.1(c) is inapplicable. Smith never presented any federal question to the California Supreme Court. Nor did he present the vague issue raised here to any other court below. Thus, there is no state court decision that conflicts with applicable decisions of this court. There has been no decision of an important question of federal law.

In *Webb v. Webb* 451 U.S. 493 (1980), this Court reiterated the requirement in this regard.

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Id at p. 496-497.

In the context of due process claims, a similar result was reached in *Fuller v. Oregon* 417 U.S. 40 (1973).

> "The petitioner's brief also raises, without extended discussion, various due process claims . . . Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here." Id. at p. 50, footnote 11.

V. THE PETITION FAILS TO STATE AN INTELLIGIBLE QUESTION OF FEDERAL LAW

While making vague references to due process, the petition fails to set forth a specific, cogent argument on a federal question. Most of the petition argues whether California law has been correctly interpreted by California courts. The thrust of Petitioner's argument in this regard appears to be that California Civil Code sections 831 and 1112 should be given effect and the Subdivision Map Act should be ignored. The California courts correctly chose to reject this specious contention. The two provisions can and are being applied in harmonious fashion. Pursuant to California Civil Code sections 831 and 1112, Smith is entitled to express his intention to retain

the alley portions of lots. However, pursuant to the Subdivision Map Act, he must first receive approval for a lot line adjustment. This requirement precludes the undesirable effects which might occur if landowners are allowed to randomly shift segments from one lot to another, or allowed to hold the segments separately as "strip lots."

There is nothing arbitrary about concluding that a lot has been subdivided when a seller specifically excludes a portion of the lot. There is a direct, highly rational connection between the two facts.

As in *Mobile, Jackson & Kansas City Railroad Company v. Turnipseed, Administrator* 219 U.S. 35 (1910), the presumption here "is only to supply an inference . . . in the absence of other evidence contradicting such inference." Id at p. 43. Smith had ample opportunity to rebut the presumption by providing evidence, if any existed, to show that the lots which he owned did not include the streets. Smith failed to provide evidence, either administratively or at trial, to rebut the presumption.

Smith's real complaint goes to an issue of state law applied by a state court. The courts concluded that the California Subdivision Map Act is a comprehensive scheme of regulation which should control. There simply is no federal question presented for review.

The "contrary intention" which Petitioner was given the opportunity to show was simply whether, as Smith contended, the alley strips had . . fact previously been separated from the lots by one of Smith's predecessors-in-interest. Such a showing was necessary to support Smith's contention that he acquired the vacated alleys as a separate entity from the lots. There is simply no due

process violation by requiring a party to produce evidence on an issue which that party has raised.

Smith's citation of *Banks v. Ogden* 69 U.S. 57, 17 Law. Ed. 818 (1864) does not require a different result. The *Banks* decision demonstrates the long-standing rationality of considering the streets to be part of the lots. California has long applied this widely recognized rule. ". . . [T]he real boundary line of the property is not to the side line of the street but its center line." *Anderson v. Citizens Sav. and Trust Co.* 185 Cal. 386, 392 (1921).

Smith understood that he was changing lot lines. At the City Council hearing of November 19, 1990, Smith spoke following the staff's presentation of the factual basis for the notice of violation. According to the minutes of that hearing,

> James E. Smith, 2100 Gatun, stated he acted according to law when he sold the lots to Emsley and Roulette. He stated the lot line maps have all the signatures of the property owners. He added that the law allows him to apportion maps by deed. *Mr. Smith stated he owns vacated Serpentine and can apportion land to whatever lot is near that land.* He stated there are no violations in this situation and that the strip lot in question is an access easement per Fire Department regulations. [Emphasis added] (Ex. 20, set forth herein as Appendix 1 at App. 4.)

Smith chose to ignore the Subdivision Map Act. The City, Superior Court and Court of Appeal recognized that it applied to Smith's effort to change the lots. No federal issue was involved.

VI. CONCLUSION

The Petition for Writ of Certiorari should be denied. No federal question was presented to or decided by the California Supreme Court. The Court of Appeal addressed an unfounded claim of lack of procedural due process; however, the "question" presented here was never presented to any court below. The question presented is vague, unintelligible and unsupported by cogent argument. The Petition is frivolous. Fees and costs should be awarded against Petitioner. Rule 42.2.

MARK A. POTTER
Attorney for Respondents
City of Del Mar and
City Council of the
City of Del Mar

CIVIL D015814

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

JAMES E. SMITH,

Plaintiff and Appellant,

vs.

CITY COUNCIL OF THE CITY OF DEL MAR; CITY OF DEL MAR, a municipal corporation; and DOES I through 100, inclusive,

Defendants and Respondents.

COURT OF APPEAL
LODGED EXHIBITS

MAY 12 1992

CASE NUMBER

APPEAL FROM THE SUPERIOR COURT
SAN DIEGO COUNTY

RONALD S. PRAGER, JUDGE

NOTICE OF LODGMENT

MARK A. POTTER
Attorney at Law
5090 Shoreham Place, Suite 101
San Diego, CA 92122
(619) 455-9737

Attorney for
Respondents
City of Del Mar and
City Council of Del Mar

APPENDIX 1

NOTICE IS HEREBY GIVEN that exhibits 1 through 36, previously lodged with the trial court on June 10, 1991 (C.T. p. 134) and on September 9, 1991 (C.T. p. 225), have been lodged with the Court of Appeal.

Dated: May 8, 1992

/s/ Mark A. Potter
MARK A. POTTER
Attorney for respondents

DEL MAR MINUTES
REGULAR MEETING – NOVEMBER 19, 1990

* * *

ADMINISTRATIVE HEARINGS

ITEM 7
DETERMINATION OF WHETHER TO RECORD A NOTICE OF VIOLATION OF ILLEGAL SUBDIVISION REGARDING LOTS H, I, J, IN BLOCK 12 OF ARDEN HEIGHTS, UNIT NO. 3; OBJECTING PARTY: JAMES E. SMITH; NON-OBJECTING PARTIES: S. SCOTT EMSLEY, ROBIN EMSLEY, MARGARET ROULETTE (1306-7)

Staff report by Associate Planner Tuchscher indicated that brief history of Lots H, I, and J, reveals that the lots were created in 1910 by a map that showed the subject lots and a strip dedicated to the public for alley/roadway purposes. In 1925, the County Board of Supervisors vacated the alleys/roads. The owner of the lots could thereafter possess and use the strip area, unburdened by the prior alley/roadway interest of the public that had been vacated. As of July 31, 1925, and March 4, 1972 Lots H, I, and J included the area delineated as alleys/roads as above. In 1977, Mr. Smith purchased Lots H, I, and J together with the alley strips.

Associate Planner Tuchscher concluded that in 1988, upon the transfer of an interest in Lots H, I, and J to Emsley and Roulette, the entire area of each lot was not conveyed. Namely the alley portions of each of the lots was retained by Mr. Smith. Associate Planner Tuchscher explained that the strip lots created by Smith during the

1988 transfers to Emsley/Roulette, as described in the current deeds, do not comply with and were not created in compliance with the provisions of the Subdivision Map Act or the City of Del Mar's Subdivision Ordinance.

Staff stated that when the City has reason to believe that a lot has been subdivided contrary to law, the Subdivision Map Act directs the City to give the owner notice that the City intends to record a Notice of Violation. The purpose of the administrative hearing is to allow Mr. Smith the opportunity to present evidence as to why the Notice of Violation should not be filed with the County Recorder as to the strip lots to which he holds title.

In conclusion, Associate Planner Tuchscher stated that based upon the findings outlined in the staff report, staff recommends the filing of Notices of Violation for the strip lots mentioned above.

James E. Smith, 2100 Gatun, stated he acted according to law when he sold the lots to Emsley and Roulette. He stated the lot line maps have all the signatures of the property owners. He added that the law allows him to apportion maps by deed. Mr. Smith stated he owns vacated Serpentine and can apportion land to whatever lot is near that land. He stated there are no violations in this situation and that the strip lot in question is an access easement per Fire Department regulations.

IT WAS MOVED BY COUNCILMEMBER HUGO-MARTINEZ, SECONDED BY COUNCILMEMBER WINTERER, TO DIRECT STAFF TO RECORD A NOTICE OF VIOLATIONS FOR LOTS H, I, AND J IN BLOCK 12 OF ARDEN HEIGHTS (STRIP PORTIONS). MOTION CARRIED UNANIMOUSLY.

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No. 93-359

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

THE CITY OF DEL MAR,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State of California

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, James E. Smith, respectfully submits this Reply to Brief in Opposition.

REQUEST FOR JUDICIAL NOTICE

Petitioner hereby requests this Court to take "Judicial Notice" of the Petition for Writ Of Certiorari, Case No. 93-488, filed in this Court on September 27, 1993, involving the same lots H, I & J, Final Map No. 1285 and court below.

ARGUMENT

THE CONTENTIONS RAISED BY PETITIONER HAVE BEEN PRESENTED TO THE LOWER COURTS

The Constitutional issues present in the case at bar have been the same throughout this litigation. Respondent City has utterly failed to address the contentions presented once again. Respondent's tack in opposing the Writ is to merely say the issues have for the first time been raised in this Court.

A review of Respondent's stated authority amply demonstrates that the grounds proffered by Respondent, in support of the position that this court does not have jurisdiction, simply do not exist.

Petitioner's posture from the inception of this litigation has been that the presumptions embodied in California Civil Code §§ 831 and 1112 have no "rational connection," by way of application, to the California Subdivision Map Act.

In *Fuller v. Oregon*, 417 U.S. 40 (1973) the Court therein noted that the question of sufficiency of the notice and hearing provided Petitioner was first raised at the Supreme Court. Id at p 50, Fn. 11. The present case clearly is not, *for the first time*, contending that §§ 831 and 1112 cannot be utilized to justify a Subdivision Map Act violation.

Similarly, in *Webb v. Webb*, 451 U.S. 493 (1980) this Court noted that "the record as a whole show[s] either expressly or by clear implication" that the due process claim was presented. The case at bar shows that both those criteria are present.

That the contentions and issues presented here are "Due Process" concerns is undisputable. (See Petition for Writ at pp 16 and 21 citing *Mobile, Jackson & Kansas City Railroad Company v. Turnipseed, Administrator,* 219 U.S. 35 (1910), and *Iran v. INS,* 656 F.2d 469 (1981) for authority that the conduct complained of is violative of "Due Process.")

The construction of the statutes involved in this case is an arbitrary one at the very least. Arbitrarily dispensing the law would seem to be at the core of any "Due Process" claim, as it is here.

Disallowance of this Petition on the grounds that a particular argument heading did not contain the specific language "Due Process" would itself offend the notion of "Due Process" if for no other reason than that it would be fundamentally unfair.

The record herein more than demonstrates that these contentions have been litigated ad infinitum in the lower courts. The Petition should be granted.

Respectfully submitted,

Dated: October 8, 1993 /s/ JAMES E. SMITH
JAMES E. SMITH
Propria Persona